

761
No. 2155

United States
Circuit Court of Appeals
For the Ninth Circuit.

Transcript of Record.
(IN FIVE VOLUMES)

EBNER GOLD MINING COMPANY (a Corporation),
Plaintiff in Error,
vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,
Defendant in Error.

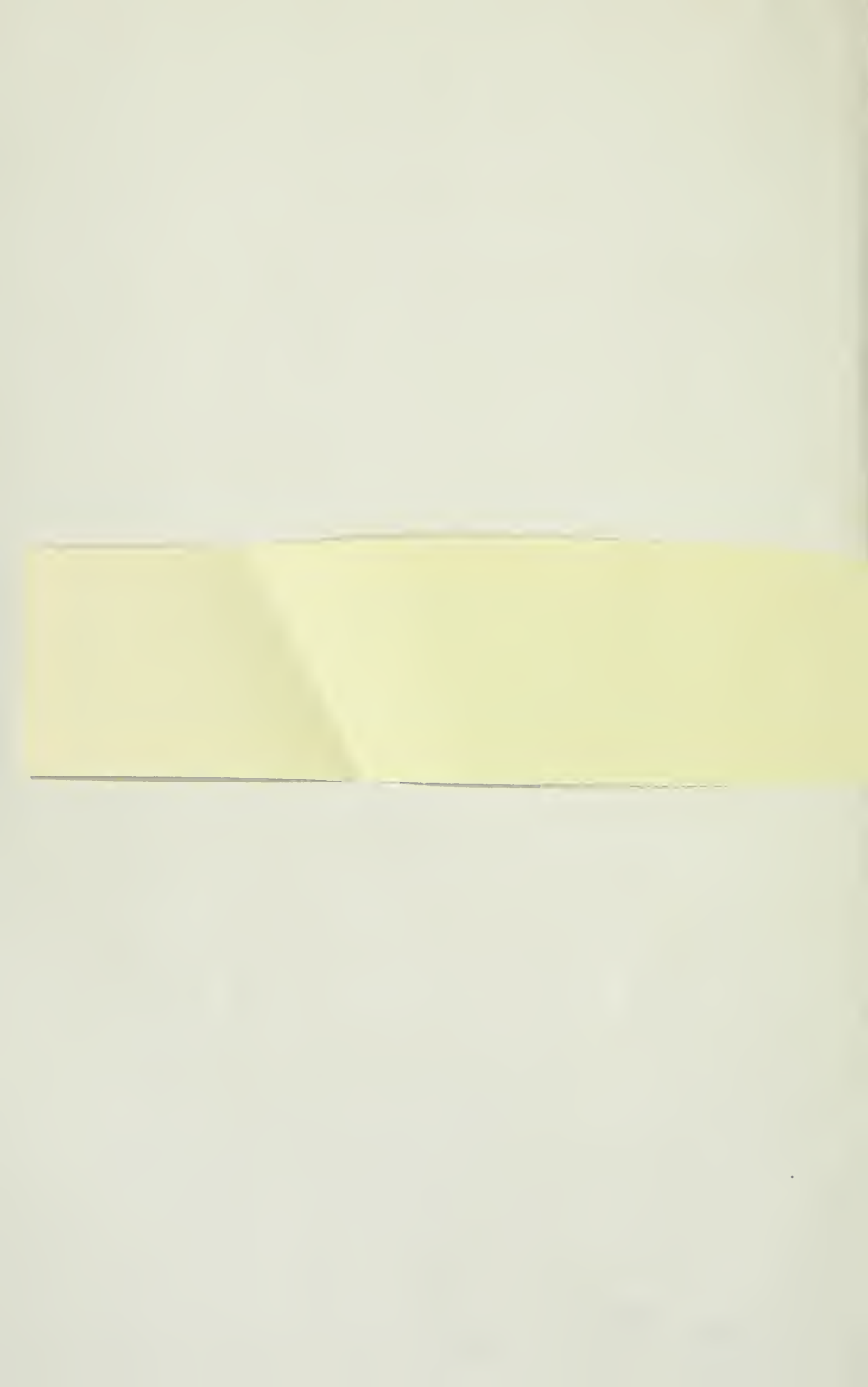
VOLUME I.
(Pages 1 to 368, Inclusive.)

Upon Writ of Error to the United States District Court of
the District of Alaska, Division No. 1.

FILED

DEC 27 1912

Records of H. L. S. Cairns
Count of 61
761



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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of Attorneys of Record.]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff and Plaintiff in Error,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant and Defendant in Error.

Messrs. WINN & BURTON, Attorneys for Plaintiff
and Plaintiff in Error, Juneau, Alaska.

Messrs. HELLENTHAL & HELLENTHAL, and
Messrs. SHACKLEFORD & BAYLESS, Attorneys for Defendant and Defendant in Error,
Juneau, Alaska.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 2155.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff in Error,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant in Error.

**Statement of Errors on Which Plaintiff in Error
Intends to Rely and the Parts of the Record
Which Plaintiff in Error Thinks Necessary for
Consideration.**

Now comes the plaintiff in error above named, and hereby makes the following Statement of Errors on which it intends to rely and urge upon its writ of error in the above-entitled court in said cause, and of the parts of the record which it thinks necessary for the consideration thereof, said errors being those set forth in said plaintiff in error's assignment of errors contained in the Transcript of Record on file herein and hereby referred to, to wit:

STATEMENT OF ERRORS.

The Court erred in overruling and denying plaintiff's motion to strike from defendant's answer all those portions of the same and each and every part thereof moved against in the motion of plaintiff filed herein on May 15, 1911.

II.

The Court erred in overruling plaintiff's demurrer to the defendant's further answer to the second cause of action stated in the amended complaint, and also plaintiff's demurrer to defendant's answer to the third cause of action stated in the amended complaint; which said demurrer is filed herein on May 16, 1911.

III.

The Court erred in allowing the defendant herein, after the trial of said cause, to amend its answer herein by pleading a noncompliance of plaintiff in

performing the annual assessment work upon the Parrish No. 2 Lode Mining Claim, and pleading a forfeiture thereof; which said amendment was filed on June 9th, 1911.

IV.

The Court erred in permitting the defendant upon the trial of said cause over the objections of the plaintiff, to introduce evidence with reference to the appropriation and acquisition of water and water rights and the conveying of such water by flume, pipe, or ditch line across mining claims and real estate of others and conveying such water to the place of use or intended use of such appropriator. The introduction of such evidence and testimony to establish any such custom among miners of South-eastern Alaska and in the Harris Mining District was all admitted over the objections and exceptions of the plaintiff.

V.

The Court erred in not making, signing and filing the following Findings of Fact and Conclusions of Law offered and tendered by the plaintiff herein respecting Parrish No. 2 Lode Mining Claim, to wit:

Finding No. 4 offered and tendered by plaintiff herein, which said finding is substantially as follows:

“That the plaintiff is now and has been for several years last past, seised, possessed and entitled to the possession and the owner by discovery, location staking and marking of the boundaries and recording by its grantors and predecessors in interest and by a full compliance with the laws of the United States and doing and per-

forming of the annual assessment work each and every year of the Parrish No. 2 Lode Mining Claim, etc.”

And in not making and signing and filing Finding No. 5 offered and tendered by plaintiff, which requested the Court to find:

“That while plaintiff was so seised and possessed and entitled to the possession of the Parrish No. 2 Lode Mining Claim, the defendant, some time in the month of August, 1910, and before the commencement of this action, without right or title, entered into possession of part of Parrish No. 2 Lode Mining Claim and ousted and ejected plaintiff therefrom and now unlawfully and wrongfully withholds the possession thereof from the plaintiff.”

And in not making, signing and filing Finding No. 6 offered and tendered by the plaintiff herein, which is substantially as follows:

“The Court further finds that at the time of the commencement of this action and for several years prior thereto the plaintiff was the owner and entitled to the possession of said Parrish No. 2 Lode Mining Claim as against the defendant and all persons and corporations whomsoever, and all of the service ground thereof.”

The Court also erred in not making the Findings of Fact tendered and requested by plaintiff which are as follows:

(a) “The Court further finds that the annual assessment work and labor required by law has

been done and performed upon the Parrish No. 2 Lode Mining Claim for the years 1907, 1908, 1909 and 1910 and within the time in each of said years required by law.”

(b) “The Court further finds that the annual assessment work required by law has been done and performed upon the Parrish No. 2 Lode Mining Claim for the years 1908, 1909 and 1910.”

(c) “The Court further finds that the annual assessment work and labor has been done and performed upon the Parrish No. 2 Lode Mining Claim each and every year since its location in the year of 1899.”

VI.

The Court erred in not making, signing and filing Conclusions of Law Nos. 1 and 2 offered and tendered by plaintiff which in substance requested the Court to conclude that the plaintiff was entitled to a writ of ejectment ejecting said defendant from Parrish No. 2 Lode Mining Claim, and granting a restraining order against the defendant restraining it from anywise interfering with plaintiff's possession of Parrish No. 2 Lode Mining Claim.

VII.

The Court erred in making and rendering its Findings No. 5, which is as follows:

“That the plaintiff is not and never has been seised, possessed or entitled to the possession of that certain tract of ground described in paragraph III of the plaintiff's second cause of action, set forth in the amended complaint herein

and known and referred to as Parrish No. 2 Lode Mining Claim. That the ground claimed by the plaintiff as Parrish No. 2 Lode Mining Claim was located solely for purposes of convenience; that no discovery of mineral-bearing rock in place of any value was ever made by the plaintiff or its grantors, nor any indication or evidence of such as could or would warrant or justify one in spending time, work or money in its development or in the expectation of finding ore."

Also in making Finding No. 6, wherein the Court finds in substance that plaintiff did not, prior to the year 1909, perform the necessary assessment work on Parrish No. 2 Lode Mining Claim.

The Court also erred in making all that part of Finding No. 7 in which it finds that the defendant proceeded to erect a part of a dam on the public domain, and that at said time the property described in Parrish No. 2 Lode Mining Claim was a part of the unoccupied and unsegregated public domain of the United States. All of which said Findings were against law and without any evidence to support the same, and in many respects against all of the evidence in said cause and against the admitted facts by both plaintiff and defendant in the pleadings and upon the trial and hearing of said cause.

VIII.

The Court further erred in making the following findings: Finding No. 8, in which the Court finds in substance that under the custom of miners of Harris Mining District, being the District in which Parrish No. 2 Lode Mining Claim is located, that appropria-

tors of water had uniformly the right to build ditches, etc., across unpatented mining claims owned and held by other persons, etc., and also Finding No. 9, in which the Court finds substantially that under the customs of miners the riparian proprietor has no right to the use of water of running streams by reason of such riparian ownership, as against a prior appropriator, and that the defendant went upon Parrish No. 2 Lode Mining Claim to construct a dam, etc., for the purpose of diverting and appropriating the water to be used in running of a stamp-mill, etc.; for the reason that each and all of said findings are against law, unsupported by the evidence, and against the great preponderance of evidence and against the uncontradicted facts in the case.

IX.

The Court erred in making his Conclusion No. 3, which reads as follows:

“That the location known as Parrish No. 2 Lode Mining Claim is void and of no effect.”

Said conclusion is without any evidence to support the same. The Court further erred in making Conclusion No. 5, which reads as follows:

“The Court further concludes that neither of the parties is entitled to recover costs in this suit.”

—for the reason that said conclusion is unsupported by the evidence and against law—the Court having granted affirmative relief to the plaintiff and adjudged it to be the owner of the Lotta Lode Mining Claim set forth and described in the first cause of action in the amended complaint, and by reason of

this the plaintiff was entitled to recover its costs in said action.

X.

The Court erred in that part of the judgment and decree in said cause wherein it adjudged and decreed as follows:

“It is further considered, ordered, adjudged and decreed that the plaintiff take nothing further by his complaint herein, and except as to the Lotta Lode Mining Claim this cause and action be dismissed without costs to either side.”

XI.

The Court erred in overruling the motion of plaintiff for new trial herein.

XII.

The Court erred in not signing, settling and allowing the Bill of Exceptions presented for said purpose on the 23d day of May, 1912.

Parts of the record which plaintiff in error thinks necessary for the consideration of said errors by the Court of Appeals is as follows:

FIRST: All of the original certified record (excluding the exhibits other than those hereinafter requested), except that part of said record entitled “Balance of Evidence to Complete Bill of Exceptions and Transcript,” immediately following the certificate of the Court Reporter, which certificate is dated May 15, 1912, and certifies that the testimony and evidence preceding such certificate is all the testimony, etc., pertaining to the Parrish No. 2 Lode Mining Claim; such certificate being numbered in lower right-hand corner 1222 by rubber stamp.

The part of the evidence excluded is pages numbered 1 to 299, both inclusive, in typewriting bottom center paging, following the testimony, evidence and certificate aforesaid, and being numbered 1223 to 1522 in lower right-hand corner by rubber stamp.

SECOND: Exhibits which the plaintiff in error requests to be printed are as follows, viz.:

PLAINTIFF'S EXHIBITS.

Exhibit "N," on page —— (Map Ebner Mining Claims).

Exhibit "M," on page —— (Photo showing tunnels).

Exhibit "QQ," on page —— (Photo).

Exhibit "PP," on page —— (Photo).

Location Notice Parrish No. 2 Lode, page ——.

Deed from Wm. M. Ebner to Ebner Gold Mining Company conveying Parrish No. 2 Lode, page ——.

Contract, Deed and Resolution in re conflict Parrish No. 1 with Colorado Lode, pages —— to ——.

Answer and Oral Opinion in Cause No. 803-A, page ——.

Copy of page 99 of Ledger of Ebner Gold Mining Company, page ——.

DEFENDANT'S EXHIBITS.

Exhibit No. 3 (Plat), on page ——.

Exhibit No. 9, on page —— (Photo showing rock).

Exhibit No. 21, on page —— (Photo).

Exhibit No. 68, on page —— (Photo).

Exhibit No. 69, on page —— (Photo).

Exhibit No. 66, on page ——— (Plat of Geological Sketch map of Gold Creek).

Exhibit No. 70, on page ——— (Photo open cut).

Exhibit No. 11 on page ——— (Plat showing mining properties in and about Juneau).

Certain canvas sack containing exhibits of rocks.

WINN & BURTON,

Attorneys for Plaintiff in Error.

Service of the within and foregoing statement of Errors on which plaintiff in error intends to rely, and parts of record which plaintiff in error thinks necessary for consideration, upon its Writ of Error in said foregoing entitled cause, is admitted this 15th day of July, A. D. 1912.

J. A. HELLENTHAL,

Attorney for Defendant in Error.

[Endorsed]: 2155. In the United States Circuit Court for Ninth Circuit. No. 2155. Ebner Gold Mining Co., a Corporation, vs. Alaska-Juneau Gold Mining Co., a Corporation. Statement of Errors on which Plaintiff in Error Intends to Rely, and Parts of Record Which Plaintiff in Error Thinks Necessary for Consideration. Filed Jul. 22, 1912. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals for the
Ninth Circuit, Holden at San Francisco.*

THE EBNER GOLD MINING COMPANY, a
Corporation,

Plaintiff in Error,

vs.

THE ALASKA-JUNEAU GOLD MINING COM-
PANY, a Corporation,

Defendant in Error.

**Request of the Defendant in Error That the Entire
Record be Printed.**

Comes now, the Alaska-Juneau Gold Mining Company, defendant in error herein, and represents as follows:

That it was served with a notice by the plaintiff in error, that a statement of the errors on which the plaintiff in error intends to rely and also a statement of those parts of the record which plaintiff in error thinks necessary for the consideration of the matters intended to be reviewed.

The defendant in error believes that the evidence relating to the various matters is so interwoven that the matters referred to in said statement and the errors therein assigned cannot be reviewed unless the entire record consisting of the entire bill of exceptions, as well as all of the exhibits, is printed and submitted to the Court; and the defendant in error thinks that the entire record is material, including all of the testimony, as well as the exhibits offered at the trial, including that portion of the bill of excep-

tions sought to be excluded by the plaintiff in error, the same being pages No. 1 to 299, both inclusive, in typewriting bottom center paging being No. 1223 to 1522 in lower right-hand corner by rubber stamp, and all the exhibits contained in the bill of exceptions or sent down as part of the record not enumerated in the list of exhibits which plaintiff in error seeks to have printed. The defendant in error therefore asks that the entire record be printed by the Clerk.

J. A. HELLENTHAL,

HELLENTHAL & HELLENTHAL,

Attorneys for Defendant in Error.

[Endorsed]: 2155. In the United States Circuit Court of Appeals for the Ninth Circuit. The Ebner Gold Mining Company, a Corporation, Plaintiff in Error, vs. Alaska-Juneau Gold Mining Company, a Corporation, Defendant in Error. Request of the Defendant in Error That the Entire Record be Printed. Filed Jul. 22, 1912. F. D. Monckton, Clerk.

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Amended Complaint.

Plaintiff complains of the defendant and alleges:

I.

That the plaintiff is a corporation (organized December 5, 1895), and existing under and by virtue of the laws of the United States provided for the District of Alaska, and is authorized to do and has been engaged and doing a general mining business in said District for over fifteen years.

2.

That the defendant is a corporation duly organized and doing business in the District of Alaska.

3.

That the plaintiff is now and has been for several years last past seized in fee and possessed and entitled to the possession of that certain patented lode mining claim situated in Harris Mining District, District of Alaska, viz.: The Lotta lode mining claim, U. S. Mineral Survey No. 87, more particularly described as follows, to wit: Beginning at Corner No. 1 Lotta lode claim (patented), a post at the NW. centre end of claim; [1*] thence north $57^{\circ} 24'$ east 150 feet to Corner No. 2; thence south $31^{\circ} 36'$ east 1500 feet to Corner No. 3, identical with Corner No. 5 Taku Gold & Silver lode claim, Survey No. 88, patented, and Corner No. 1 Royal lode, Survey No. 238, patented; thence south $57^{\circ} 24'$ west 150 feet to south-east centre end of Lotta lode, 300 feet to Corner No. 5, identical with Corner No. 5 Royal lode, Survey No. 238, patented; whence east side doorway of old

*Page-number appearing at foot of page of original certified Record.

cabin bears north $5^{\circ} 7'$ east 96.2 feet distance; thence north $31^{\circ} 36'$ west 1500 feet to Corner No. 6; thence north $57^{\circ} 24'$ east 150 feet to NW. centre end and place of beginning. Mag. Var. of all courses from a true meridian 32° east of north.

4.

That while plaintiff was so seized, the defendant between the — day of August, A. D. 1910, and the commencement of this action, and without right or title, entered into possession of part of said Lotta lode mining claim, and constructed thereon a dam and flume for the purpose of conveying from, on and over part of said patented Lotta lode mining claim the waters of Gold Creek flowing in, through and over said Lotta lode mining claim; and ousted and ejected therefrom, and now unlawfully and wrongfully withholds the possession thereof from the plaintiff.

FOR A SECOND CAUSE OF ACTION:

1.

That the plaintiff is a corporation authorized to do and doing business in the District of Alaska, and organized, etc., as mentioned in paragraph 1 of the first cause of action.

2.

That the defendant is a corporation doing business in the [2] District of Alaska.

3.

That the plaintiff is now, and has been for several years last past, seized, possessed and entitled to the possession, and the owner by discovery, location, staking and marking of the boundaries and record-

ing by its grantors, and by a full compliance with the laws of the United States, and the doing and performing of the annual assessment work, of the Parish No. 2 lode mining claim, situate in the Harris Mining District, District of Alaska, and fully described in the Location Notice thereof of record in Book 15 of Lodes, page 157, of the Records of the Juneau Recording District, in the office of the Recorder of said Juneau Recording District, in the District of Alaska, as follows, viz.:

Commencing at the notice of location posted on a post in Gold Creek canyon about 600 feet in a westerly direction from the southwest corner of the Lotta patented claim and running in a southeasterly direction parallel to the said Lotta and the Royal lode claims, patented, and about 300 feet from the same to the end of lode claim, Parish No. 1, being 700 linear feet, and from the location post in a northwesterly direction parallel with the southwest line of the said Lotta lode claim 800 linear feet, together with 300 feet in width of surface ground on each side of the center of the lode line. Side lines are described as follows, viz.: Commencing at the southeast corner marked by a post situated about 125 feet in a southeasterly direction from the southwest corner of the Lotta lode claim and on the southwest side line of the Royal lode claim, thence in a southwesterly direction 600 feet to a post; thence in a northwesterly direction parallel with the southwest side line of said Lotta lode claim 1500 feet to a post, thence in a northeasterly

direction 600 feet to the southwest side line of the said Lotta lode claim; thence southeasterly along the southwest side line of the said Lotta lode claim to the southwest corner of said lode claim and 125 feet beyond in the same direction to a post, the point of beginning.

4.

That while plaintiff was so seized and possessed and entitled to the possession of the above-described Parish No. 2 lode mining claim the defendant, between the — day of August, A. D. 1910, and the commencement of this action, and without right [3] or title, entered into possession of part of said Parish No. 2 lode mining claim hereinabove described, and constructed and built upon, across and over said Parish No. 2 lode mining claim a grade and placed thereon a flume, for the purpose of conveying the waters of Gold Creek over, upon and across the said Parish No. 2 lode mining claim; and ousted and ejected plaintiff therefrom, and now unlawfully and wrongfully withholds the possession thereof from the plaintiff.

FOR A THIRD CAUSE OF ACTION:

1.

That the plaintiff is a corporation authorized to do and doing business in the District of Alaska, and organized and existing as stated in paragraph 1 of the first cause of action.

2.

That the defendant is a corporation doing business in the District of Alaska.

3.

That the plaintiff is now, and has been for several years last past, seized, possessed, and entitled to the possession, and the owner by discovery, location, staking and marking of the boundaries, and the doing and performing of the annual assessment work and extensive development by tunnel, etc., and by actual occupation, and by a full compliance with the laws of the United States, of the Cape Horn lode mining claim, situated in the Harris Mining District, District of Alaska, and described as follows, viz.:

Commencing at the NE. corner of Cape Horn No. 1 lode, whence the SW. corner of Parish No. 2 lode, Survey No. 934, bears S. $48^{\circ} 30'$ east 329 feet distance; thence along Gold Creek bottom south 45° west 600 feet to the SE. Corner of claim; thence N. 45° west 1500 feet to the SW. corner of claim; thence north 45° [4] east 600 feet to NW. corner of claim; thence south 45° east 1500 feet to the NE. corner of claim, and place of beginning, containing an area of 20.661 acres. The southeast corner of this claim is further described as being in Gold Creek bottom and about 125 feet in a north-easterly direction above the Jualpa dam.

4.

That while plaintiff was so seized, possessed and in the actual occupation, and entitled to the possession, of said Cape Horn lode mining claim, the defendant between the — day of July, A. D. 1910, and the commencement of this action, and without right or title, entered into possession of part of said

Cape Horn lode mining claim above described, and erected and built thereon a house or cabin, and ousted and ejected plaintiff therefrom, and now unlawfully and wrongfully withholds the possession thereof from the plaintiff.

WHEREFORE plaintiff prays judgment against the defendant:

1. For the recovery of the possession of the premises from which plaintiff has been ousted and ejected by the defendant as in this complaint fully set forth and described.

2. That the defendant be restrained and forever enjoined from interfering with the possession of the plaintiff in and to the mining claims herein described or any part thereof.

3. For costs and disbursements of this action.

4. For such other and further relief as plaintiff may be entitled to receive.

WINN & BURTON,
Attorneys for Plaintiff. [5]

United States of America,
District of Alaska,—ss.

Jno. R. Winn, being first duly sworn, on oath deposes and says: That I am one of the attorneys for the plaintiff herein and have read over and drafted the Amended Complaint herein, and all the material allegations of said Amended Complaint are within the personal knowledge of affiant; and that the matters, things and facts set forth in said Amended Complaint are true as affiant verily believes.

JNO. R. WINN.

Subscribed and sworn to before me this 8th day of May, A. D. 1911.

[Seal]

NEWARK L. BURTON,
Notary Public for Alaska.

[Endorsed]: Original. No. 835-A. In the District Court for the District of Alaska, Division No. 1, at Juneau. Ebner Gold Mining Co., Plaintiff, vs. Alaska-Juneau Gold Mining Co., Defendant. Amended Complaint. Filed May 8, 1911. E. W. Pettit, Clerk. By _____, Deputy. John R. Winn, Newark L. Burton, Attorneys for _____. Office, Juneau, Alaska, Office No. _____. [6]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

Case No. 835-A.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Answer.

Comes now the defendant and for answer to the first cause of action stated in the amended complaint, admits, denies and alleges as follows:

1st. The defendant denies each and every allegation in said amended complaint contained with reference to said first cause of action, except that the de-

fendant is a corporation doing business in Alaska.

2d. The defendant alleges that the plaintiff is not a corporation either *de jure* or *de facto*, and has no capacity either to sue or hold property.

3d. That the defendant is the owner of and entitled to the possession of all that certain tract of mining ground situated up Gold Creek, about one mile from the town of Juneau in the District of Alaska, more particularly described as follows, to wit:

“Commencing at discovery post, thence south 14 degrees west 100 feet to post No. 1, center of south end line lying on north side line of Colorado lode, U. S. S. 612; thence north 84 degrees east 300 feet to post No. 2; thence north 14 degrees east 1500 feet to post #3; thence south 84 degrees west 600 feet to post #4; thence south 14 degrees west 1500 feet to post #5, identical with corner #5 [7] Colorado lode; thence north 84 degrees east 300 feet to post #1.”

—which said mining ground is held and claimed by this defendant under and by virtue of a certain lode mining location made by J. P. Corbus in the month of October, 1899, and known as the Oregon mining claim, and also by virtue of a certain mining lode location made on July the 20th, 1910, by R. G. Datson, which said location is designated and known as the Oregon lode mining claim; that both of which said mining claims and locations were by mesne conveyances conveyed to this defendant and this defendant is now the owner thereof.

4th. That the defendant is the owner, in the possession of and entitled to the possession to a cer-

tain patented lode mining claim U. S. Survey #641, contiguous to the Oregon lode mining claims above described and more particularly bounded and described as follows:

“Beginning at Cor. No. 1 Colorado lode, identical with Cor. No. 4 Royal lode Sur. No. 238, SE. Loc. Cor. Colorado bears S. 33.45 E. 77.64 feet, U. S. Loc. Mon. No. 2, situate in Silver Bow Basin, bears 86.47 E. 5817 feet distance; Thence S. 56.15 W. along 2-3 Nevada lode Sur. #612, 86.30 feet to Cor. No. 2, identical with Cor. No. 2 Survey #612; thence S. 41.15 E. along line 2-1 Nevada lode Sur. #612, 34.96 feet to corner No. 3; thence S. 84.00 W. 1381.75 feet to Loc. Cor. #4; thence N. 33.45 W. 600 feet to Loc. Cor. No. 5; thence N. 84.00 E. along creek bottom, 1474.11 feet to Loc. Cor. No. 6; thence S. 33.45 E. 522.36 to Cor. No. 1, the place of beginning, containing an area of 17.862 acres Var. 30 Deg. 00 Min. E.”

5th. The defendant further alleges that at the time of making the discovery thereon hereinafter referred to the ground hereinafter described as being within the boundaries of the Canyon vein or lode was open, unoccupied, unexplored public land of the United States, save and except [8] as to any claim of the defendant Alaska-Juneau Gold Mining Company. That during the month of October, 1910, to wit, on the 8th day of October, 1910, one W. R. Lindsay, a citizen of the United States, made a discovery of rock in place bearing gold and other precious metals within the exterior boundaries of the

said Canyon vein or lode claim as hereinafter described, and the said W. R. Lindsay did thereupon locate the lode or vein within which the said mineral was so discovered by him by marking the boundaries of the claim located with substantial monuments so that the same could be readily traced upon the ground, and did, within a reasonable time thereafter and as soon as the necessary surveying could be done, post a notice on the ground and record with the District Recorder at Juneau, the recording district within which said claim was located, his notice of location, which said notice was so recorded on the 18th day of October, 1910. The claim so located was named and designated as the Canyon vein or lode; that the said Canyon vein or lode so located and situated is near or above the head of the Last Chance Basin, in the Harris Mining District, and is more particularly described as follows, to wit:

“Beginning at this notice which is situated on the left bank of Gold Creek about fifty feet up the stream from the lower Alaska-Juneau dam and about 400 feet down the stream from the lower Ebner mill in Harris Mining District, Alaska, and running 900 feet northwesterly and 600 feet southeasterly therefrom with 300 feet on each side of the center line so described. This claim is bounded on its northwesterly side by the Lotta lode mining claim U. S. Lot No. 87.”

6th. The defendant further alleges that its dam referred to in the amended complaint as being upon ground owned by the plaintiff, is in truth and in fact situated upon and within the boundaries of the de-

fendant's above-described Oregon and Canyon lode mining claims. And that the flume referred to in said amended complaint is situated upon and within the boundaries of [9] the defendant's said Oregon, Canyon and Colorado lode mining claims, extending from said dam over and across said Oregon and Canyon claims until it reaches the point where said Oregon and Colorado claims adjoin, from which point it extends across said Colorado claim until it reaches the compressor plant of the defendant, situated upon said Colorado claim, where the waters of Gold Creek conveyed thence by means of said flume are utilized.

7th. And the defendant further answering said first cause of action stated in the amended complaint herein, alleges: That on the 17th day of November, 1910, it commenced a suit to quiet the title to its above-described Oregon lode mining claims, and to all the ground embraced within the boundaries thereof, and that on the 21st day of November, 1910, it commenced a suit to quiet the title to its above-described Canyon lode mining claim and to all the ground embraced within the boundaries thereof, which suits were brought in the District Court for the District of Alaska, Division No. 1, at Juneau, against the pretended corporation styled the Ebner Gold Mining Company, the plaintiff herein, and others. That the subject matter in dispute between the parties in said suits and the subject matter in dispute in this action are the same and identical. That said suits so brought are still pending and undecided, and were so

pending and undecided at the time this action was brought.

The defendant for answer to the second cause of action stated in the amended complaint, admits, denies and alleges as follows:

1st. The defendant denies each and every allegation in said amended complaint contained with reference to said second cause of action, except that the defendant is a corporation doing business in Alaska.
[10]

2d. The defendant alleges that the plaintiff is not a corporation either *de jure* or *de facto*, and has no capacity either to sue or hold property.

2d-b. And defendant further alleges as a further defense to said second cause of action that if the plaintiff ever acquired any interest in premises and mining claims set forth in said second cause of action, neither the plaintiff nor any of his grantors or predecessors in interest did or performed or caused to be performed any work, labor or improvements of any kind and nature or description, upon or for the use and benefit of said Parish No. 2 lode claim under or by virtue of said alleged location of plaintiff, and that plaintiff and his grantors wholly failed and neglected to represent said claim or resume work thereon until long after the water and mining locations of defendants as hereinafter set forth and have *fail* to record the affidavit of annual labor and improvements required by statute, and thereby the plaintiff's claim, if any he had, became and was actually forfeited.

3d. That the defendant is the owner of and entitled to the possession of all that certain tract of min-

ing ground situated up Gold Creek, about one mile from the town of Juneau in the District of Alaska, more particularly described as follows, to wit:

“Commencing at discovery post, thence south 14 degrees west 100 feet to post No. 1, center of south end line lying on north side line of Colorado lode U. S. S. 612; thence north 84 degrees east 300 feet to post No. 2; thence north 14 degrees east 1500 feet to post #3; thence south 84 degrees west 600 feet to post #4; thence south 14 degrees west 1500 feet to post #5, identical with corner # 5 Colorado lode; thence north 84 degrees east 300 feet to post #1.”

—which said mining ground is held and claimed by this defendant under and by virtue of a certain lode mining location made by J. P. Corbus in the month of October, 1899, and known as the [11] Oregon mining claim, and also by virtue of a certain mining lode location made on July the 20th, 1910, by R. G. Datson, which said location is designated and known as the Oregon lode mining claim; that both of which said mining claims and locations were by mesne conveyances conveyed to this defendant and this defendant is now the owner thereof.

4th. That the defendant is the owner, in the possession of and entitled to the possession of a certain patented lode mining claim U. S. Survey #641, contiguous to the Oregon lode mining claims above described, and more particularly bounded and described as follows:

“Beginning at Cor. No. 1 Colorado lode, identical with Cor. 4 Royal lode Sur. No. 238,

S. E. Loc. Mon. No. 2, situate in Silver Bow Basin, bears 86.47 E. 5817 feet distance; thence S. 56.15 W. along 2-3 Nevada lode Sur. #612, 86.30 feet to Cor. No. 2, identical with Cor. No. 2, Survey No. 612; thence S. 41.15 E. along line 2-1 Nevada lode Sur. #612, 34.96 feet to corner No. 3; thence S. 84.00 W. 1381.75 feet to Loc. Cor. #4; thence N. 33.45 W. 600 feet to Loc. Cor. No. 5; thence N. 84.00 E. along creek bottom, 1474.11 feet to Loc. Cor. No. 6; thence S. 33.45 E. 522.36 to Cor. No 1, the place of beginning, containing an area of 17.862 acres—Var. 30.00 E.”

5th. The defendant further alleges that at the time of making the discovery thereon hereinafter referred to, the ground hereinafter described as being within the boundaries of the Canyon vein or lode was open, unoccupied, unexplored public land of the United States, save and except as to any claim of the defendant, Alaska-Juneau Gold Mining Company. That during the month of October, 1910, to wit, on the 8th day of October, 1910, one W. R. Lindsay, a citizen of the United States, made a discovery of rock in place bearing gold and other precious metals within the exterior boundaries of the said Canyon vein or lode claim as hereinafter described, and the said W. R. Lindsay did thereupon locate the lode or vein within which the said mineral was so discovered by [12] him by marking the boundaries of the claim located with substantial monuments so that the same could be readily traced upon the ground, and did, within a reasonable time

thereafter and as soon as the necessary surveying could be done, post a notice on the ground and record with the District Recorder at Juneau, the recording district within which said claim was located, his notice of location, which said notice was so recorded on the 18th day of October, 1910. The claim so located was named and designated as the Canyon vein or lode; that the said Canyon vein or lode so located and situated is near or above the head of the Last Chance Basin, in the Harris Mining District, and is more particularly described as follows, to wit:

“Beginning at this notice which is situated on the left bank of Gold Creek about fifty feet up the stream from the lower Alaska-Juneau dam and about 400 feet down the stream from the lower Ebner mill in Harris Mining District, Alaska, and running 900 feet northwesterly and 600 feet southeasterly therefrom with 300 feet on each side of the center line so described. This claim is bounded on its northwesterly side by the Lotta lode mining claim U. S. Lot No. 87.”

6th. The defendant further alleges that its dam referred to in the complaint as being upon ground owned by the plaintiff is in truth and in fact situated upon and within the boundaries of the defendant's above described Oregon and Canyon lode mining claims. And that the flume referred to in said complaint is situated upon and within the boundaries of the defendant's said Oregon, Canyon and Colorado lode mining claims, extending from said dam over

and across said Oregon and Canyon claims until it reaches the point where said Oregon, Canyon and Colorado claims adjoin, from which point it extends across said Colorado claim until it reaches the compressor plant of the defendant situated upon said Colorado claim, where the waters of Gold Creek conveyed thence by means of said flume are utilized.

[13]

7th. And the defendant, further answering said second cause of action, stated in the amended complaint herein, alleges: That on the 17th day of November, 1910, it commenced a suit to quiet the title to its above-described Oregon lode mining claims and to all the ground embraced within the boundaries thereof, and that on the 21st day of November, 1910, it commenced a suit to quiet the title to its above-described Canyon lode mining claim and to all the ground embraced within the boundaries thereof, which suits were brought in the District Court for the District of Alaska, Division No. 1, at Juneau, against the pretended corporation styled the Ebner Gold Mining Company, the plaintiff herein, and others. That the subject matter in dispute in this action are the same and identical. That said suits so brought are still pending and undecided, and were so pending and undecided at the time this action was brought.

The defendant, further answering said second cause of action stated in the amended complaint, alleges:

1st. That the defendant, the Alaska-Juneau Gold Mining Company, is engaged in the business of open-

ing up, developing and operating mines situated at or near Silver Bow Basin, in the District of Alaska, and that said corporation is the owner of and in the possession of a large group of mining claims, composed of thirty-one (31) patented and a considerable number of unpatented claims, situated in and near Silver Bow Basin, along Gold Creek, above the town of Juneau, in the District of Alaska. That said defendant has for many years past been operating its mines and developing the same.

2d. That the said Alaska-Juneau Gold Mining Company, the defendant herein, has for many years last past been engaged in extracting the ore from its said mines and in developing the same, and has in connection with such work erected such mills [14] and other appliances as were necessary to mill and extract the gold from the ore mined, and has in connection with its mining operations erected a thirty-stamp mill upon its said property, and pressed the development work done on said mines with all convenient speed, with a view of erecting other and larger mills and increasing its facilities for treating the ore extracted; that the development work done in connection with said mining operations has been carried so far that the erection of a two-hundred-stamp mill is now necessary to successfully carry on its said mining operations. With this end in view, the said defendant corporation has laid out a plan which includes the erection and construction of a two-hundred-stamp mill on the shore of Gastineau Channel, immediately below the town of Juneau, and the building of a tramway from said mill along the

proposed route, extending from said mill to a point on the Colorado lode mining claim, which said last-mentioned Colorado lode mining claim is owned and possessed by the said Alaska-Juneau Gold Mining Company, and lies adjacent to and joins the Oregon and Canyon lode mining claims above described, which said tramway will at its terminal connect with a tunnel to be driven from the point where such connections are made through various lode mining claims, the property of the said Alaska-Juneau Mining Company, to the point where the mining operations of said company are now being carried on. That there is flowing through, over and upon the above-described Oregon and Canyon lode mining claims a small creek carrying on an average, approximately, 25,000 or 30,000 miner's inches of water; that said creek enters the said Oregon lode mining and Canyon claims across its northerly end line and flows thence southerly across said claims; that the waters of said [15] creek so flowing across the said Oregon and Canyon claims were, on or about the first day of August, 1910, unappropriated, unused and unclaimed by any person or persons whatsoever and were flowing across said claims in their natural channel and thence on down through the Last Chance Basin and through Gold Creek Canyon into Gastineau Channel, an arm of the Pacific Ocean. That the Alaska Electric Light and Power Company has appropriated and are using a small portion of the waters of said Gold Creek, diverting the same at a point approximately one-half mile below the point where the said Gold Creek

passes out of the boundaries of the said Oregon and Canyon lode mining claims; that there are no other appropriators or users of the waters of said Gold Creek at any place between the point where the said creek enters the said Oregon and Canyon lode mining claims at its upper end and the mouth of said creek except the small portion diverted and used by the said Electric Light & Power Company as aforesaid; that all the remaining waters in the said creek on the said first day of August, 1910, were unappropriated and open to appropriation for beneficial uses, and that on or about the said first day of August, 1910, while the said waters of said Gold Creek were thus unappropriated and unused, except in so far as they were appropriated and used by the said Alaska Electric Light & Power Company as aforesaid, one L. D. Mulligan, acting as agent and employee of the defendant, the Alaska-Juneau Gold Mining Company and for and on behalf of said company, located the unappropriated waters of said Gold Creek thus flowing therein as aforesaid, 20,000 miner's inches, to be diverted at a point on said Oregon lode mining claims, a short distance below the lower side line of the Lotta lode mining claim [16] referred to in the plaintiff's amended complaint herein, and did then and there post a notice of his said locations, which said notice of location is in words and figures as follows:

“KNOW ALL MEN BY THESE PRESENTS: That I, L. D. Mulligan, of Alaska, a citizen of the United States, and over the age of twenty-one years, have appropriated and

claimed 20,000 miner's inches, of the water of Gold Creek, near Juneau, Alaska, to be used for mining, milling and other purposes.

Said water to be diverted from said creek at a point indicated by this notice, posted on a tree, and about one mile from the mouth of said Gold Creek.

Said water is to be diverted by ditch, pipe and flume.

(Signed) L. D. MULLIGAN.

Dated Aug. 1st, 1910."

That said notice of location was signed by said L. D. Mulligan in person, wherefore and whereupon, and on the 2d day of August, 1910, the said Mulligan made, executed and delivered to the said Alaska-Juneau Gold Mining Company his certain deed in writing, conveying to the said corporation all his right, title and interest in the waters so appropriated, which said deed of conveyance was made and executed for the purpose of vesting in the said corporation the legal title standing in the name of the said Mulligan, who, although acting as agent of the said corporation, signed said notice of appropriation in his own name. That said notice of appropriation was thereafter, and on the 8th day of August, 1910, duly and regularly recorded in the office of the District Recorder of the Juneau Recording District, the same being the district wherein said Gold Creek is located; that said notice of location was posted at or near the proposed point of diversion on the Oregon lode and Canyon lode mining claims above described; that immediately after the posting of said notice, and

upon the said 1st day of August, 1910, the said Alaska-Juneau Gold Mining Company commenced work looking towards the diversion and appropriation of the waters flowing in said Gold Creek over and above any [17] excess appropriated by the said Alaska Electric Light & Power Company to the extent of 20,000 miner's inches as claimed in said notice, and that a crew of men has been continuously at work in the construction of pipe, flume and ditch lines as well as the construction of a dam at the point of diversion, all of which dam, pipe, flume and ditch lines are intended to and will be used for the purpose of so diverting the said waters of Gold Creek appropriated and located as aforesaid, and such work in connection with the diversion of said waters has been carried on by said company with as much speed as the conditions would permit of and without cessation or delay, and is still being so carried on, and will be pressed forward until the waters have been diverted and applied in accordance with the original intention; that the waters so appropriated were appropriated for the purpose of generating power and for other beneficial uses in connection with the operation of the two-hundred-stamp mill to be built on the shore of Gastineau Channel as hereinbefore stated, and for the purpose of driving a compressor plant situated on the Colorado claim and for other uses in connection with its mining operations; that it is the intention and purpose of the said defendant, the Alaska-Juneau Gold Mining Company, to press the work of diverting the said waters and of conducting the same through pipes and flumes to the

said proposed mill with as much speed as the weather and other conditions will admit of and without cessation or delay, and to erect said mill and have the same in readiness, and to commence the construction of said mill as soon as the necessary material can be obtained and placed upon the ground, and to press said work to completion, and it is the intention of the said company to divert the waters of Gold Creek by means of [18] said dam, flumes and pipe-lines as soon as the weather and other conditions will permit, and to apply the same in connection with the operation of said two-hundred-stamp mill and said other uses, the same being the beneficial uses designed. That the use of all the said waters so appropriated to the extent of said entire 20,000 inches will be necessary in the operation of the said mill. That the dam situated on the Oregon and Canyon claims as aforesaid has been completed as well as the flume line extending from said dam over and across said Oregon and Canyon claims to a point on the Colorado claim above described, where a compressor plant has been constructed by the defendant; that the waters of Gold Creek have been diverted by means of said dam and are now being conveyed to said compressor plant by means of said flume, where the same are applied and used for the purpose of generating power used by the defendant in driving the tunnel hereinbefore referred to, and for other purposes in connection with the construction of such works as are necessary in order to carry out its above referred to scheme of development adopted in connection

with the operation of its mine. That on the 8th day of May, 1911, the defendant posted its amended notice of the appropriation of the water already appropriated and claimed under the notice above set out, which said amended notice was posted at the point of diversion as described and located in said notice, and was thereafter and on the said 8th day of May, 1911, duly and regularly recorded in the office of the Recorder for the Juneau Recording District, the same being the district in which all the points herein referred to in connection with the water so to be appropriated and the use thereof are situated. Said amended notice so posted and recorded is in the words and figures as follows: [19]

“NOTICE IS HEREBY GIVEN that, whereas, the Alaska-Juneau Gold Mining Company did, by its agent, L. D. Mulligan, posting a notice from the waters appropriating 20,000 inches of water from the waters flowing in Gold Creek, which notice is in words and figures as follows:

‘KNOW ALL MEN BY THESE PRESENTS: That, I, L. D. Mulligan, of Alaska, a citizen of the United States and over the age of twenty-one years, have appropriated and claimed 20,000 miner’s inches, of the water of Gold Creek, near Juneau, Alaska, to be used for mining, milling and other purposes.

Said water to be diverted from said creek at a point indicated in this notice, posted on a tree, and about one mile from the mouth of said Gold Creek.

Said water is to be diverted by ditch, pipe and flume.

L. D. MULLIGAN.

Dated Aug. 1st, 1910.'

And whereas, the said L. D. Mulligan acted as the agent of the undersigned in this connection, who is now the owner and holder of said right so located by said Mulligan by virtue of such agency and by virtue of conveyances from said Mulligan:

Now, therefore, the undersigned, not waiving any of its right or abandoning any of the rights belonging to it under and by virtue of said above-described notice and the work of diverting the water of Gold Creek appropriated by reason thereof, and done pursuant thereto, but for the purpose of giving a more accurate and detailed description of the beneficial uses to which said water is to be put and the place and places where the same is to be used when diverted and applied under the aforesaid notice and of the means whereby the same is to be conveyed to such place of intended use, hereby posts and records this additional and amended notice of appropriation of water, and gives notice to all persons whatsoever that it claims and appropriates under and by virtue of such original [20] notice as well as this amended notice 20,000 miner's inches of the waters of Gold Creek measured under a four-inch pressure for mining, milling power and other beneficial uses, to be diverted from said creek at a point at or near the place where this notice is posted, the same being posted on the banks of Gold Creek about one mile and one-eighth ($1/8$) above the town of Juneau

about 500 feet below the Ebner mill and about 1250 feet above the Jualpa Dam and immediately at the point where the dam of the Alaska-Juneau Gold Mining Company has been constructed and where the water is diverted under the above-mentioned location notice, signed by L. D. Mulligan. The water so appropriated and claimed under said notice of L. D. Mulligan and hereunder is to be diverted from Gold Creek at that point, and conveyed by means of pipes, flumes, ditches and other means of conveyances, along a proposed route running above the southerly side of the Last Chance Basin and thence around Swede Hill to a point at or near Jorgenson sawmill, on the shore of Gastineau Channel, where the same is to be applied and used for the purpose of generating power and for other purposes to be used in connection with the operation of a stamp-mill at or near that point, and a portion of the water so diverted and appropriated is to be used at a point on the Colorado claim near Snow Slide Gulch for the purpose of driving a compressor plant at that point and for the purpose of generating power at that point and these waters so used on said Colorado claim will be conveyed by a pipe, flume, ditch along the route above indicated and taken from said pipe, flume and ditch to the extent so necessary at said last-mentioned place if used for the purpose of furnishing power at that point as above stated. The remainder of the water carried not used at this point, at any time to be [21] applied in connection with the operation of the stamp-mill to be built near the Jorgenson sawmill as above stated.

Notice is expressly given that the undersigned has not abandoned or waived any of the rights acquired under and by virtue of the notice of said L. D. Muligan or by virtue of any of the work it has heretofore performed looking towards the diversion and appropriation of the waters of Gold Creek or any other right or rights whatsoever it has at this present time to the waters of said creek.

Posted on the ground this 8th day of May, 1911.

ALASKA-JUNEAU GOLD MINING CO.

By ROBERT A. KINZIE,

Agent and General Superintendent."

3d. That said flume and ditch used for the diversion of the waters of Gold Creek as aforesaid is constructed over and across a portion of the Oregon and Canyon claims in conflict with the alleged Parish No. 2 claim as described in the complaint.

4th. That the pretended Parish No. 2 and Oregon and Canyon claims are all unpatented mining claims, and the ground within the boundaries of said claims wholly belongs to the unpatented public domain of the United States, claimed under said pretended Parish No. 2, Oregon and Canyon locations but not otherwise claimed, located or held by anyone except the United States, and has never been in the actual and physical possession of anyone except the defendant.

5th. That in order that the mines of the Alaska-Juneau Gold Mining Company may be worked to advantage, it is necessary that the plans above delineated and described be carried out to its fullest extent in every detail and that the [22] water of

Gold Creek be conveyed to the proposed site of the mill to be erected and there used to generate the power with which said mill can be operated, and also that said water be conveyed to the compressor plant now situated on the Colorado plant and there used for the purpose of generating power and other purposes and uses in connection with the driving of the tunnels above described and the operation of the mines. That the water of Gold Creek cannot be diverted and carried to either point and applied to the uses indicated, unless the same be diverted approximately at the point where the dam is now built and where the same are now being diverted and carried by means of pipes, flumes and ditches along the ditch and flume-line above described extending over and across the land embraced within the unpatented Oregon claims and the other pretended unpatented conflicting claims and the said water cannot be diverted and appropriated for use in connection with the operations of the defendant's mines, unless a ditch, flume and pipe-line be built across said ground and along the route indicated above from the point of diversion to the place of use.

6th. That gold was first discovered in Alaska in about the year 1880, that some of the mining claims now owned and operated by the defendant's company were the first quartz locations made in the District of Alaska and were made at about that time. That the newly discovered district was named the "Harris Mining District" after its discoverer. That the topographical and climatic conditions of South-eastern Alaska, the territory in which the new dis-

covery was made were such that the soil was not adapted for any other purposes, except that here and there some small gardens may possibly be made where some few vegetables that need not be ripened in [23] order to make them fit for use could be produced, and that the doctrine of riparian right was wholly inapplicable to the territory of Alaska and to the conditions obtainable there. That Gold Creek as well as all and singular the property rights and other places connected with the same to which reference is made in this answer are situated within the boundaries of the Harris Mining District. That at a meeting of the miners of the Harris Mining District held in the year 1882, the miners of said district duly and regularly adopted the following rules with reference to the diversion and appropriation of water;—

“Article 1. The right to use the running water flowing in a river or stream, or down a canyon or ravine, may be acquired by appropriation.

Art. 2. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases.

Art. 3. The person entitled to the use may change the place of diversion, if others are not injured by such change and may extend the ditch, flume, pipe or aqueducts by which the diversion is made to place beyond that where the first use was made.

Art. 4. A water appropriation may be turned into channel of another stream and mingled with its waters and then reclaimed, but in reclaiming it the

water already appropriated by another must not be diminished.

Art. 5. As between appropriators, the one first in time is the one first in right.

Art. 6. A person desiring to appropriate water must [24] post a notice in writing in a conspicuous place at the point of intended diversion, stating therein: First: He claims the water there flowing to the extent of (giving the number) inches, measured under a four-inch pressure. Second: The purpose for which he claims it, and the place of intended use. A copy of the notice must within ten (10) days after it is posted be recorded in the books kept by the recorder of the district.

Art. 7. Within twenty days, during the working season, after the notice is posted, the claimant must commence the excavations or construction of the works, in which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by rain or snow.

Art. 8. By 'completion' it is meant conducting the waters to the place of intended use.

Art. 9. By a compliance with the above rules, the claimant's right to the use of the water related back to the time the notice was posted.

Art. 10. A failure to comply with such rules deprives the claimant of the right to the use of the water as against a subsequent claimant who complies therewith.

Art. 11. Persons who have heretofore claimed the right to water and who have not diverted nor applied

it to some useful purpose, must after this title takes effect, and within twenty days thereafter, proceed as in this title provided, or their right ceases.”

That all and singular said rules and regulations have been and remain in force and have been universally observed by the miners of the Harris Mining District at all [25] times since and are still being so observed and are in all respect in full force and effect.

7th. That ever since the discovery of gold in Alaska as above indicated, and up to the present time, certain customs have been in force and have been observed universally by the miners of the Harris Mining District, the same being the district within which Gold Creek and all and singular the matters in dispute in this action are situated, and also by the miners in the territory outside of the said Harris Mining District, lying in the vicinity of Juneau as well as all the various mining districts lying in *which* is known as Southeastern Alaska. That according to the customs of the miners of said territory so described the riparian owner requires no right to the water flowing within the stream by reason of such ownership, but the right to the use of such water could and can be acquired only by diversion appropriation and application to a *beneficiary* use. That all and singular the rules adopted by the miners of the Harris Mining District as above indicated were and are observed by all the miners in the territory known as Southeastern Alaska, and all and singular the rights and liabilities conferred by or existing under, or by virtue of said rules, existed under and are

recognized by the customs of the miners of Southeastern Alaska, which said customs are uniformly and universally recognized and adhered to by all the miners residing in or operating within said territory embraced in what is known as Southeastern Alaska, and like customs are also recognized and existing in all the various districts within the territory of Alaska. That, by these customs of the miners, right to the use of water can be acquired only in the manner indicated by the rules of the [26] miners above referred to and the failure to comply with these rules and customs in accordance with the customs of miners above referred to, work a forfeiture against whoever fails to comply with said rules and customs and according to said customs, all rights are forfeited by the person acquiring the same upon a failure on his part to take any one or more of the succeeding steps, required to be taken by him under said rules and customs; that is, the rules adopted by the miners of the Harris Mining District as above stated are in all respects identical with the customs of the miners universally observed and recognized by the miners in all mining districts of Southeastern Alaska, including the Harris Mining District, and also recognized by the miners of the entire territory of Alaska in accordance with said customs that the riparian proprietor has no right as such to the use of the water flowing in the stream and the right thereto can be acquired only in the manner above indicated.

That according to the customs of the miners, recognized and observed in the Harris Mining District as well as in all the other mining districts above re-

ferred to, including all mining camps situated in the Southeastern Alaska, the right to construct ditches and flumes to be used in connection with the diversion and appropriation of water, over and across all portion of the public domain of the United States claimed by mineral claimants, whether said ground be claimed and held under lode placer location, exists and is recognized and has existed and has been recognized at all times since gold was first discovered in Alaska, under which said custom each miner or person operating a mine has a right to go upon the unpatented mining claims of others and construct ditches and flumes over and across the same for the purpose of diverting and [27] appropriating water and conveying the same to any point where he may intend to apply the same to a beneficial use connected with the operation of his mine, the sluicing of his gravel or the milling of his ores.

That all and singular the above referred to customs and rights existing thereunder are universally and uniformly observed and recognized by all the miners residing, not only in the Harris Mining District but in all the various mining districts of Southeastern Alaska as well as those of other portions of the territory of Alaska, and have been recognized and have so existed as long as mining operations have been carried on in any and all the various districts.

8th. That the work done in the excavation by the defendant's company in no wise damages the ground across which said flume-line has been built, and that the construction and maintenance of said flume-line in no way interfere with the use of the ground across

which same has been built for mining or other purposes, and in no wise hinders or interfered with the mining of the ores contained within any of the mining claims across which same has been built or constructed, and add to and in no wise detracts from the value of the same or any of them.

9th. That the right of use of water acquired by diversion, appropriation and application to beneficial use, as recognized by the above referred to customs as well as the right to construct ditches and flumes for the purpose of diverting and conveying water, has been and is recognized by the decision of the Courts of Alaska.

WHEREFORE, the defendant prays that the plaintiff's amended complaint be dismissed and that they and each of them recover the costs and disbursements in this behalf incurred.

SHACKLEFORD & BAYLESS,

HELLENTHAL & HELLENTHAL,

Attorneys for Defendant. [28]

United States of America,
District of Alaska,—ss.

I, Robert A. Kinzie, being first duly sworn, on oath say: That I am the agent and general Superintendent of the Alaska-Juneau Gold Min. Co. in the above-entitled action; that I have read the foregoing answer and know the contents thereof, and believe the same to be true; that I make this verification because.

ROBT. A. KINZIE.

Subscribed and sworn to before me this 12th day of May, A. D. 1911.

JAMES CHRISTOE,
Notary Public for Alaska.

Due service of a copy of the within is admitted this 12 day of May, 1911.

WINN & BURTON,
Attorneys for Plaintiff.

[Endorsed]: Original. No. 835-A. In the District Court for the District of Alaska, Division No. 1. Ebner Gold Mining Company, Plaintiff, vs. Alaska-Juneau Gold Mining Company, Defendant. Answer. Filed May 12, 1911. E. W. Pettit, Clerk. By H. Malone, Deputy. J. A. Hellenthal, Attorney for Defendant. Office: Juneau, Alaska. [29]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

No. 835-A.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Motion to Strike.

Comes now the above-named plaintiff, by its attorneys, Winn & Burton, and moves to strike from the answer herein of the above-named defendant all the following, to wit:

I.

All of paragraph VII of said answer, for the reason that the matters set up therein are immaterial and irrelevant matters, and do not in any wise constitute a defense to the matters and facts set forth in the complaint.

II.

Moves to strike from said answer all of paragraphs I, II, III, IV, V, and VI and each and all of the subdivisions of paragraph VI which are referred to as Articles 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11; all of paragraphs VII, VIII and IX, from the defendant's further answer to the second cause of action stated in the complaint, for the reason and upon the ground that each and all of said paragraphs set forth irrelevant and immaterial matters, and the matters and facts set forth in each and all of said paragraphs constitute no defense to the matters, facts and allegations contained in the complaint herein; that said action set [30] forth in the complaint herein is a simple action in ejectment, and the matters and facts set forth in the paragraphs moved against constitute no defense to the said suit in ejectment and are immaterial, and do not tend to defeat the rights of the defendant to recover by reason of the cause or causes of action set forth in said complaint.

III.

Moves to strike from the defendant's answer to the third cause of action stated in the complaint the following, to wit: All of paragraph IV, for the reason that the same is irrelevant and immaterial matter, and the matters and facts so set forth in said para-

graph constitute no defense to any of the matters and facts set forth in the complaint or any of the causes of action set forth in said complaint.

WINN & BURTON,
Attorneys for Plaintiff.

[Endorsed]: Original. No. 235-A. In the District Court for the District of Alaska, Division No. 1, at Juneau. Ebner Gold Mg. Co., Plaintiff, vs. Alaska-Juneau Gold Mg. Co., Defendant. Motion to Strike. Filed May 15, 1911. E. W. Pettit, Clerk. John R. Winn, Newark L. Burton, Attorneys for ———. Office: Juneau, Alaska. Office No. ———.
[31]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

No. 835-A.

EBNER GOLD MINING COMPANY, a Corporation,
Plaintiff,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
Defendant.

Order Denying Plaintiff's Motion to Strike.

J. R. Winn, Esquire, appearing for the plaintiff, and L. P. Shackelford, Esquire, and J. A. Hellenthal, Esquire, appearing for the defendant, and this cause coming on regularly for hearing upon the motion of plaintiff to strike certain portions from the answer herein, after argument by the respective counsel, said

motion is denied; to which ruling of the Court plaintiff excepts and such exception is allowed.

Done in open court this 15th day of May, 1911.

EDWARD E. CUSHMAN,
Judge.

Entered Court Journal H, page 123. [32]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

No. 835-A.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Demurrer.

Comes now the above-named plaintiff by its attorneys, Winn & Burton, and demurs to the defendant's further answer to the second cause of action stated in the amended complaint, and for cause of demurrer states:

I.

That the said further answer to the said second cause of action stated in the said amended complaint does not state facts sufficient to constitute a defense to the matters and facts set forth in the second cause of action of said amended complaint.

II.

Plaintiff also demurs to defendant's answer to the

third cause of action stated in the amended complaint, for the reason and upon the ground that the same does not state facts sufficient to constitute a defense to the matters and facts set forth in the third cause of action of said amended complaint.

WINN & BURTON,
Attorneys for Plaintiff.

[Endorsed]: Original. No. 835-A. In the District Court for the District of Alaska, Division No. 1, at Juneau. Ebner Gold Mining Co., Plaintiff, vs. Alaska-Juneau Gold Mining Co., Defendant. Demurrer. Filed May 16, 1911. E. W. Pettit, Clerk. By H. Malone, Deputy. John R. Winn, Newark L. Burton, Attorneys for ———. Office: Juneau, Alaska. Office No. ——. [33]

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corporation,
Plaintiff,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY, a Corporation,
Defendant.

Defendant.

Order Overruling Plaintiff's Demurrer.

This cause coming on regularly for hearing upon the demurrer of plaintiff to defendant's further answer to the second cause of action stated in the

amended complaint herein, J. R. Winn, Esquire, appearing for the plaintiff, and L. P. Shackleford, Esquire, and J. A. Hellenthal, Esquire, appearing for the defendant, after argument by respective counsel, and the Court being fully advised in the premises, said demurrer is overruled, to which ruling plaintiff excepts and the exception is allowed.

Done in open court this 16th day of May, 1912.

EDWARD E. CUSHMAN,
Judge.

Entered Court Journal H, page 128. [34]

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant.

Reply to Answer.

Comes now the above-named plaintiff and replying to the answer herein of the above-named defendant states:

I.

Referring to the second paragraph of said answer, this plaintiff alleges that it is a corporation, organized and existing as stated in the amended complaint

herein and has been acting as such corporation transacting business in the said District of Alaska for more than fifteen years, and has transacted business with the said defendant herein and has at all times been recognized by the said defendant as a corporation and entitled to transact business as such and to perform all the other functions of a corporation.

II.

Referring to paragraph III of said answer, this plaintiff denies the same and each and every portion thereof, and states further in respect to said paragraph that if the said J. P. Corbus ever did undertake to make a location of a mining claim called the Oregon, that said attempted location was made on behalf of and for the said defendant and was attempted to be made over, in and upon the mining claims belonging to the plaintiff set out and described in the amended complaint herein, and was attempted [35] to be made over, in and upon said claims or some portion thereof while the plaintiff herein, or its predecessors in interest or grantors, were the owners and in possession of each and all of said claims and after the said Lotta claim set forth and described in the amended complaint herein was patented and while the said Parish No. 2 mining claim described in the amended complaint were valid and subsisting claims, held, owned and possessed by the plaintiff herein or its grantors by reason of prior discovery, location, staking and marking of the boundaries, posting of notices and recording of the same and by a full compliance with the laws of the United States pertaining

to the performance of annual assessment work thereon, and that if said Corbus ever attempted to locate the premises described in the answer as the Oregon claim for or on behalf of himself or said defendant, the said attempted location and said claim to the premises described in said answer as the Oregon claim were afterwards abandoned and forfeited by reason of said defendant and its agent and representative, Corbus, failing in all respects to comply with the laws of the United States and local customs, rules and regulations pertaining to the performance of the annual assessment work on said pretended lode mining claim; that the said defendant, nor its predecessors in interest, nor the said Corbus, never performed any assessment work on said claim whatsoever and never attempted to comply with the law in regard to performing the necessary annual assessment work on said pretended location;

And this plaintiff further alleges that if the said R. G. Datson mentioned in said paragraph ever attempted to make any location of what is termed the Oregon lode mining claim in the year 1910, that said Datson attempted to make the same on behalf [36] of the said defendant herein, and any and all attempted locations made by the said Datson were in, over and upon the property, mining claims and premises owned and possessed by the plaintiff herein, as set forth and described in the amended complaint, and was an attempt to make a location over, in and upon the Lotta patented claim, the Taku Gold & Silver claim, patented, and the Parish No. 2, the latter mining claim being prior, subsisting and valid

locations owned, held and possessed by this plaintiff by reason of prior discovery, location, marking on the ground, posting and recording of notice and in full compliance with the laws of the United States in respect to holding mineral land and in complying with the law, local rules and regulations pertaining to the performance of annual assessment work thereon, and was an attempt made by the said Datson on behalf of said defendant company to relocate the said pretended Oregon claim as located by the said Corbus, in the manner hereinbefore set forth, and said attempted location by said Datson on the part of said defendant was false, fictitious and void, and was made, as this plaintiff verily believes, to harass and annoy said plaintiff and becloud the title to its said property.

III.

Referring to paragraph IV of the said answer to the amended complaint herein, this plaintiff denies the same and each and every portion thereof, and alleges that if said defendant is the owner and possessed of a certain patented mining claim known as United States Survey 641 and termed the Colorado Claim, the only premises or property that was ever patented by reason of said instrument and the only ground that was ever patented by [37] virtue of said survey as described and located upon the ground by the monuments and actual measurements, irrespective of anything that may be asserted in said patent, is bounded and described as follows, to wit:

Beginning with Corner No. 1 of the Colorado lode, Survey No. 641, identical with Corner No.

4 of the Royal, Survey No. 238; thence south $58^{\circ} 24'$ west 86.30 feet to Corner No. 2, identical with Corner No. 2 of the Nevada Lode, Survey No. 612; thence south $39^{\circ} 06'$ east 34.96 feet to Corner No. 3; thence north $88^{\circ} 30'$ west 1123.16 feet to Corner No. 4 identical with Corner No. 1 of the Idaho Placer, Survey No. 641; thence north $31^{\circ} 36'$ west 600 feet to Corner No. 5, identical with Corner No. 6 Idaho Placer, Survey No. 641 and Corner No. 3 Last Chance Placer, Survey No. 142; thence south $88^{\circ} 54'$ east 1215.12 feet to Corner No. 6 on line 5-4 Royal Lode, Survey No. 238, whence Corner No. 5 Royal Lode bears north $31^{\circ} 36'$ west 567.64 feet, thence south $31^{\circ} 36'$ west 522.36 feet to Corner No. 1, the place of beginning.

That said Colorado claim was patented as a subsequent and junior mining claim to the other mining claims which it lies between, and only as a matter of fact contains the ground embraced within the exterior boundary lines above described and set forth.

IV.

Referring to paragraph V of said answer to the amended complaint, this plaintiff denies the same and each and every portion thereof, and alleges that if the said Lindsay mentioned in said paragraph did attempt to make a location of the premises described in said paragraph as a mining claim, the same was invalid, for the reason that the said attempted location was made on behalf of said defendant by said Lindsay in, over and upon the Lotta patented claim and the Parish No. 2 mining claim, being the same

Lotta and Parish No. 2 mentioned and described in the amended complaint herein, and said attempted and pretended location was made at the time that said Lotta was a patented claim, owned and held and in the actual possession of this plaintiff, and while the said Parish No. 2 was owned and held and in the actual possession of this plaintiff, by reason of [38] prior discovery, location, marking of boundaries, posting and recording of notices and while the same was a valid and subsisting mining claim by reason of this plaintiff having complied with all the laws, rules and regulations with respect to performing the annual assessment work thereon, and said location was made for the purpose of harassing and annoying this plaintiff more particularly for the reasons hereinafter set forth in this reply, and also was and is an attempt of defendant to relocate a part of the old Oregon claim, which it has abandoned and forfeited as heretofore alleged in this reply.

IV.

Referring to paragraph VI of the answer to the amended complaint herein, this plaintiff denies the same, and each and every portion thereof.

And this plaintiff replying to the answer of the defendant to the second cause of action set forth in the amended complaint, states and alleges as follows:

I.

That this plaintiff alleges it is a corporation as stated in the amended complaint herein, and has been carrying on and conducting business in the District of Alaska as alleged in the said amended complaint and set out herein; has dealt with said corporation

during said period of time as a corporation, recognizing its legal existence and capacity to hold property and do and transact business in Alaska.

II.

Referring to paragraph III of the answer to the second cause of action herein, this plaintiff denies the same and each and every portion thereof, and states further in respect to said [39] paragraph that if the said J. P. Corbus ever did undertake to make a location of a mining claim called the Oregon, that said attempted location was made on behalf of and for the said defendant and was attempted to be made over, in and upon the mining claims belonging to the plaintiff set out and described in the amended complaint herein, and was attempted to be made over, in and upon said claims or some portion thereof while the plaintiff herein, or its predecessors in interest or grantors, were the owners and in possession of each and all of said claims and after the said Lotta claim, set forth and described in the amended complaint herein, was patented and while the said Parish No. 2 lode mining claim described in the amended complaint were valid and subsisting claims, held, owned and possessed by the plaintiff herein or its grantors, by reason of prior discovery, location, staking and marking of the boundaries, posting of notice, and recording of the same and by a full compliance with the laws of the United States pertaining to the performance of annual assessment work thereon, and that if said Corbus ever attempted to locate the premises described in the answer as the Oregon claim for or on behalf of himself or said defendant, the

said attempted location and said claim to the premises described in said answer as the Oregon claim were afterwards abandoned and forfeited by reason of said defendant and its agent and representative, Corbus, failing in all respects to comply with the laws of the United States and local customs, rules and regulations pertaining to the performance of the annual assessment work on said pretended lode mining claim; that the said defendant, nor its predecessors in interest, nor the said Corbus, never performed any assessment work on said claim whatsoever, and never attempted [40] to comply with the law in regard to performing the necessary annual assessment work on said pretended location.

And this plaintiff further alleges that if the said R. G. Datson mentioned in said paragraph ever attempted to make any location of what is termed the Oregon lode mining claim in the year 1910, that said Datson attempted to make the same on behalf of the said defendant herein, and any and all attempted locations made by the said Datson were in, over and upon the property, mining claims and premises owned and possessed by the plaintiff herein, as set forth and described in the amended complaint, and was an attempt to make a location over, in and upon the Lotta patented claim, the Taku Gold and Silver claim, patented, and the Parish No. 2 lode mining claim, the latter mining claims being prior, subsisting and valid locations, owned, held and possessed by this plaintiff by reason of prior discovery, location, marking on the ground, posting and recording of notices and in full compliance with the laws of

the United States in respect to holding mineral land and in complying with the law, local rules and regulations pertaining to the performance of annual assessment work thereon, and was an attempt made by the said Datson on behalf of said defendant company to relocate the said pretended Oregon claim as located by the said Corbus, in the manner hereinbefore set forth, and said attempted location by said Datson on the part of said defendant was false, fictitious and void, and was made, as this plaintiff verily believes, to harass and annoy said plaintiff and becloud the title to its said property.

III.

Referring to paragraph IV of the answer to the second cause of action herein, this plaintiff denies the same and each [41] and every portion thereof, and alleges that if said defendant is the owner and possessed of a certain patented mining claim known as United States Survey 641 and termed the Colorado claim, the only premises or property that was ever patented by reason of said instrument and the only ground that was ever patented by virtue of said survey as described and located upon the ground by the monuments and actual measurements, irrespective of anything that may be asserted in said patent, is bounded and described as follows, to wit:

Beginning with Corner No. 1 of the Colorado lode, Survey No. 641, identical with Corner No. 4 of the Royal, Survey No. 238; thence south $58^{\circ} 24'$ west 86.30 feet to Corner No. 2, identical with Corner No. 2 of the Nevada lode, Survey No. 612; thence south $39^{\circ} 06'$ east 34.96 feet to

Corner No. 3; thence north $88^{\circ} 30'$ west 1123.16 feet to Corner No. 4, identical with Corner No. 1 of the Idaho Placer, Survey No. 641; thence north $31^{\circ} 36'$ west 600 feet to Corner No. 5, identical with Corner No. 6 Idaho Placer, Survey No. 641 and Corner No. 3 Last Chance Placer, Survey No. 142; thence south $88^{\circ} 54'$ east 1215.12 feet to Corner No. 6 on line 5-4 Royal lode, Survey No. 238, whence Corner No. 5 Royal lode bears north $31^{\circ} 36'$ west 567.64 feet; thence south $31^{\circ} 36'$ east 522.36 feet to Corner No. 1, the place of beginning.

That said Colorado claim was patented as a subsequent and junior mining claim to the other mining claims which it lies between, and only as a matter of fact contains the ground embraced within the exterior boundary lines above described and set forth.

IV.

Referring to paragraph V of the answer to the second cause of action herein this plaintiff denies the same and each and every portion thereof, and alleges that if the said Lindsay mentioned in said paragraph did attempt to make a location of the premises described in said paragraph as a mining claim, the same was invalid, for the reason that the said attempted location was made on behalf of said defendant by said Lindsay in, over and upon the Lotta patented claim and the Parish No. 2 mining claim, [42] being the same Lotta and Parish No. 2 mentioned and described in the amended complaint herein, and said attempted and pretended location

was made at the time that said Lotta was a patented claim, owned and held and in the actual possession of this plaintiff and while the said Parish No. 2 was owned and held and in the actual possession of this plaintiff, by reason of prior discovery, location, marking of boundaries, posting and recording of notices and while the same was a valid and subsisting mining claim, by reason of this plaintiff having complied with all the laws, rules and regulations with respect to performing the annual assessment work thereon, and said location was made for the purpose of harassing and annoying this plaintiff, more particularly for the reasons hereinafter set forth in this reply, and also was and is an attempt of defendant to relocate a part of the old Oregon claim, which it has abandoned and forfeited as heretofore alleged in this reply.

V.

Referring to paragraph VI of defendant's amended and supplemental answer, this plaintiff denies the same and each and every allegation therein contained.

Referring to the further answer of defendant to the second cause of action stated in the amended complaint, this plaintiff admits, denies and alleges as follows:

I.

Referring to paragraph I thereof, this plaintiff has not knowledge or information sufficient to form a belief as to the matters and facts set forth therein, and therefore denies the same and each and every portion thereof. [43]

II.

Referring to paragraph II of the said further answer, this plaintiff denies the same and each and every portion thereof, except in so far as it has been in this reply or may be hereafter admitted, modified or explained. And in connection with said paragraph and the matters set forth therein this plaintiff further alleges, that if the said L. D. Mulligan ever posted a notice of the kind and nature set forth on page 10 of said answer, purporting to be dated August 1, 1910, that said notice was posted at a point fully 150 feet up Gold Creek from where the defendant has constructed its dam and was posted near the centre of the patented Lotta lode claim herein referred to, and said notice and all work thereunder was abandoned by the said defendant and was never of any validity as a water notice and was posted upon the patented ground of this plaintiff company, and for said reasons mentioned herein was absolutely void both in law and in fact.

This plaintiff referring to said paragraph and the pretended amended location notice of appropriation of water, which commences on page 13 and ends on page 15, alleges, that if any such notice was ever made out and posted by the said defendant and was posted as indicated in said notice, it was posted at a distance down the creek from the original notice which the said Mulligan claimed he posted, a distance of about 150 or 200 feet, and was either on the Lotta patented claim or the Parish No. 2 mining claim, property of this plaintiff company, and that said pretended notice, if posted and recorded as is claimed

by the defendant, is of no validity whatever as a water location or as an amended water location, for the reasons set forth herein.

III.

Referring to paragraph III of said last-mentioned answer, '[44]' this plaintiff denies the same and each and every portion thereof, except that said flume and ditch referred to therein is constructed across a part of and in part over the Parish No. 2 claim and was so constructed in the manner hereinafter set forth.

IV.

Referring to paragraph IV, this plaintiff admits that the Parish No. 2 mining claim is an unpatented claim, but denies each and every other portion, part and remaining allegation of said fourth paragraph.

V.

Referring to paragraph V of said last mentioned answer, this plaintiff denies the same and each and every portion thereof.

VI.

Referring to paragraph VI of said answer, this plaintiff denies that the pretended rules and regulations set forth in said paragraph are now or ever have been in force since either party to this action sought to acquire title to any of the property described and set forth in the pleadings herein; denies that any such rules and regulations ever have been universally or otherwise observed by the miners of the Harris Mining District, at this time or any other time, or that they are now or ever have been in force and effect; as to the remaining portions of said para-

graph VI, this plaintiff has not knowledge or information sufficient to form a belief as to the matters and facts set forth therein, and therefore denies the same and each and every portion thereof.

And this plaintiff further alleges in connection with the matters and facts set forth in said paragraph, that if any such [45] mining rules or regulations were ever in existence, they were specially repealed by the Act of May 17, 1884, being an Act entitled "An Act Providing a Civil Government for Alaska," 23 Stats. at Large, which provided for the organization of a civil government in Alaska, the extension thereof of the laws of Oregon and in Section 8 as follows: "And the laws of the United States relating to mining claims and the rights incident thereto shall, from and after the passage of the act, be in full force and effect in said district under the administration thereof herein provided for, subject to such regulations as may be made by the secretary of the interior, approved by the President."

And if any such mining rules or regulations as set forth in said paragraph ever existed or were in force, they fell into utter disuse and were abandoned before either party to this suit ever made any claim to any of the unpatented land or mining claims in dispute in this action, and any of said mining rules so set forth therein that are inconsistent with the general laws of the United States are of no force or effect whatsoever.

That none of said rules or regulations that are inconsistent with the laws of the United States have ever been recognized by the courts of the District

of Alaska since either party to this action made any claim to the property in dispute herein; in fact, the courts have held that if any such rules and regulations ever did exist, that they fell into disuse long before either the plaintiff or the defendant in this suit made any claim to the property in dispute herein, and particularly so was it held in the case of *McFarland et al. vs. The Alaska Perseverance Mining Co.*, No. 510-A of this court, by Judge James Wickersham, the presiding Judge, and which opinion is on file in said cause; the said cause was afterwards appealed to the Circuit Court of Appeals [46] and the decision of the said Wickersham affirmed. Said opinion was rendered by the said Wickersham on June 3, 1907, and was over mining property and water rights within what the defendant herein terms the Harris Mining District and within a short distance from the property in dispute in this suit.

VII.

Referring to paragraph VII of said answer, this plaintiff denies the same and each and every portion thereof, and states that if any of said customs mentioned in said paragraph ever existed, the same, by reason of the facts set forth in paragraph VI of this Reply, were repealed and are of no force and effect, and had fallen into utter disuse before ever either of the parties herein made any claim to the mining claims or any water or water rights as set forth in said answer.

VIII.

Referring to paragraph VIII of said answer, this

plaintiff denies the same and each and every portion thereof.

IX.

Referring to paragraph IX of said answer, this plaintiff denies the same and each and every portion thereof.

And further by the way of affirmative matter as a defense to the matters and facts set forth in the amended and supplemental answer to the amended complaint herein, this plaintiff alleges:

I.

That it is a corporation organized and existing as heretofore alleged in this reply, and said allegations respecting said [47] corporation are hereby referred to and made a part of this *part of this* reply.

II.

That this plaintiff is a corporation organized as hereinbefore stated and came into existence in the year 1895, and at that time and since that time has become the owner and has been in possession of a group of quartz mines and mining claims in what is termed the Harris Mining District, on Gold Creek, a distance of about one mile from the town of Juneau; all of which said claims are contiguous and adjacent to each other, with no intervening ground or mining claims owned or possessed by any other person or corporation; and said group consists of the Lotta patented claim, set forth in the complaint herein, and some seven or eight other patented claims, and the Parish No. 2 and Parish, two unpatented claims referred to in the complaint herein, together

with several other unpatented claims and several millsites.

That the creek known as Gold Creek and referred to in the pleadings herein runs through and across said mining claims for a distance of about three-quarters of a mile.

That before this plaintiff company became the owner and possessed of said mining claims and millsites, some of the said claims had been owned and possessed by this plaintiff's predecessors in interest and grantors, and they had erected on one of said claims or millsites, at or near the upper end of said group on Gold Creek, a ten-stamp mill and were engaged for several years before this plaintiff became the owner of said property in opening up and developing said mining claims and in mining and milling the ore therefrom, and had all the necessary machinery and equipment for mining and milling the ore in said [48] ten-stamp mill and did run and operate said mill for several years prior to this plaintiff becoming the owner of said property and used the water of Gold Creek for the purpose of generating power, in opening up and developing said mines and milling said ore, and said creek was tapped by the intake of the predecessors in interest and grantors of this plaintiff at a point just above the mill, which said mill is located on the right-hand bank going up the creek.

III.

That about the year of 1895, upon the organization of this plaintiff as a corporation, the property above described, except a few locations that have been made

since then, were conveyed to said corporation.

That the locations that have been made by and on behalf of this plaintiff, or conveyed to it, since said date are the Parish No. 2 claim and Parish, and which was located by William M. Ebner on the 24th day of October, 1899, and afterwards and on the 29th day of March, 1906, conveyed by the said Ebner to this plaintiff; conveyed to this plaintiff, and ever since said date said two mining claims have formed a part of the group of the property referred to herein as the plaintiff's property on Gold Creek; and said plaintiff has been in the open, notorious and actual possession of all of said property during all of said times mentioned herein and ever since the conveyance of said Parish No. 2 and the Parish to it, and ever since it first became the owner of said property in 1895 has been continuously engaged in opening up and developing and mining of its said property, milling its ore with its said 15-stamp mill, and has built and constructed necessary ore-bunkers, an air-compressor and all the necessary buildings, and had the necessary machinery [49] placed thereon for the working of said mines in a good workmanlike style and fashion, and has been using the water of Gold Creek at all of said times to generate the power therefor.

IV.

That in contemplation of the increasing of the facilities to open up, develop and mine said property and the milling of said ores, this plaintiff located, or caused to be located, for itself and successors in interest, ten thousand additional miner's inches of

water of Gold Creek, on the 20th day of June, 1910, which said location was made by H. T. Tripp for and on behalf of this plaintiff and its successors in interest and afterwards recorded in the Recorder's Office at Juneau, Alaska, that being the Recording District, in which said mining property is situated, and which said location notice reads as follows, to wit:

“Location of Water.

“Notice is hereby given to all whom it may concern that I the undersigned claim 10 thousand miners inches of the water flowing in this creek or any part of 10 thousand miners inches that may be flowing at any season of the year to be conveyed by ditch, flume or pipe along the bank of Gold Creek on the southerly side or to cross the creek with pipe or flume or both to any place on the property known as the Ebner Mine or to carry across or further then the limits of the said mine property. This location is made on the ground this day and date and is posted at the place known as the Ebner Dam about $1\frac{3}{4}$ miles up from Juneau-Alaska on Gold Creek.

“Dated this 20th day of June, 1910.

“Time 7:30 A. M.

“Locator—H. T. TRIPP.

“Witness:

“JOHN SOINI.”

V.

That at the time of making said water location it was also in contemplation of this plaintiff and its successors in interest to build a 200-stamp mill at the lower end of its property on the left bank of Gold

Creek going up said creek, on the Cape Horn Lode Mining Claim, and to convey the water from a point [50] on Gold Creek at or near where said notice was posted to said new mill and to such other points on Gold Creek as were necessary for the prosecution of the work of mining said property and milling the ores therefrom, and that in pursuance of said plan a survey was commenced on or about the last of July, 1910, of a flume-line from the point on Gold Creek at which said notice was posted to the millsite, a distance of about 4,000 feet; all of which was done prior to any pretended location of water of Gold Creek by the defendant. That said work of enlarging the facilities and increasing the capacity of the mill for the purpose of mining said property and treating the ores therefrom was, and has been, continuously kept up from the time of commencing the same to the present time, and up to the present time the said flume-line has been about completed, being built upon the left bank of Gold Creek going up said creek, and is a flume three feet by four feet and over 4,000 feet long, with a capacity to carry over ——— miner's inches of water, and the excavation for the foundation of said mill has been nearly completed and the timber frames for a 200-stamp mill shipped and now on the ground at Juneau, which includes timbers for the mill building, ore-bins and batteries; that part of the machinery for said mill has also been purchased and shipped and is on the ground at Juneau, as well as a 20-drill compressor plant, and a tunnel run from the proposed site of the new mill in and through said mining property

for a distance of 400 or 500 feet, which said tunnel is 8 feet by 8 feet, and is intended for the purpose of opening up the ore bodies to be milled and treated by said 200-stamp mill. That during all of said time and from the commencement of said work and down to the present time there has been kept employed on said property from 20 to 60 men constructing the flume and performing other necessary work for the completion of said undertaking. [51]

VI.

That while said work of plaintiff was progressing as aforesaid, the said defendant, by its officers, agents and representatives, attempted to wrongfully enter upon the said Lotta patented lode mining claim and the Parish No. 2 lode mining claim and take possession of a portion of said mining claims against the will and consent of this plaintiff, and in order to prevent said wrongful entry and trespass upon said mining claims by said defendant, its agents and representatives, this plaintiff commenced an action, being Cause No. 803-A of this court, and made application for a temporary restraining order, restraining the said defendant from trespassing upon the property of this defendant, and especially the Lotta patented claim and the Parish No. 2 mining claim; that upon the hearing thereof this Court refused said restraining order upon the grounds that there was a dispute as to the title to the property in controversy, and that the plaintiff could suffer no irreparable damages by reason of the acts complained of, and that plaintiff's remedy would be by an action in ejectment.

VII.

That thereafter and on or about the 28th day of September, 1910, while the work above mentioned was in progress, and while this plaintiff, by its representatives or agents, was in the actual possession of the said Lotta patented mining claim mentioned herein, and performing work thereon in the building of trails, etc., the said defendant by its officers, agents and employees, attempted to go upon the said Lotta patented claim and to construct and build a dam in Gold Creek on said claim and about the center of said claim, and they were requested and ordered to depart from said premises by the representatives of this plaintiff, and they did so depart and move away from said [52] premises, but again, and on, to wit, the 3d day of October, 1910, and while the said plaintiff and its agents and representatives were in the actual possession of said Lotta patented claim and also of the Parish No. 2 lode mining claim, and engaged in work upon said claims, again enter in and upon said Lotta and Parish No. 2 lode mining claims at a point near the boundary of said Lotta and Parish No. 2 mining claims, and undertook to build a dam across said creek and to divert the water therefrom, which undertaking was resisted by the representatives and agents of this plaintiff, and the said defendant company, through its agents, officers and representatives, thereupon caused the representatives and agents of this plaintiff who had been resisting the entry of said officers and agents of said defendant upon said Lotta and Parish No. 2 lode mining claims, to be arrested by the United States

Marshal on John Doe warrants, which were issued on John Doe complaints filed with the United States Commissioner, verified by an officer and representative of said defendant company, and while the agents and representatives of plaintiff were in the custody of the said United States Marshal, the said representatives, agents and employees of the said defendant company partially constructed their dam across Gold Creek sufficiently to make a pretended diversion of some water of Gold Creek into a short piece of timber flume, which had hastily been constructed by the employees of the said defendant company. That after said arrests were made and the work above resisted accomplished by the defendant company, the representatives and agents of this plaintiff returned to said Lotta and Parish No. 2 lode mining claims and proceeded with their said work, especially the running of a tunnel for the opening up of the Parish No. 2 mining claim at a point on the right hand of Gold Creek going up said creek at an altitude of about ——— feet above the bed of the creek on the hillside; that in running [53] said tunnel the debris and muck was dumped therefrom down said hillside into said Gold Creek, but all of such work and dumping was done upon said Parish No. 2 lode mining claim. That this plaintiff failing to obtain a restraining order as above set forth, the said defendant continued its said work of building and constructing a timber flume in and over the said Parish No. 2 lode mining claim, and when they reached a point in the construction of their said flume on the hillside on the right bank of said Gold Creek,

just below the mouth of the tunnel that was being run by this plaintiff as aforesaid, and where this plaintiff had been dumping, the said defendant did, by its officers and agents, again cause the representatives of this plaintiff, who were engaged in the work of running said tunnel and dumping as aforesaid, to be arrested in the same manner and form as the arrests first hereinbefore referred to, and while said representatives and agents of this plaintiff were in the custody of said United States Marshal, the said defendant connected up its said timber flume and thus crossed the said Parish No. 2 lode mining claim. That the entry of said defendant in and upon and over the ground and mining claims of this plaintiff was at all times resisted by this plaintiff and the same was a wrongful and forcible entry and against the will and consent of said plaintiff, and the only possession that said defendant ever gained of any part or portion of said Parish No. 2 or the Lotta patented claim was made in a forcible manner as herein described, and this action is brought to oust said defendant from such possession.

WHEREFORE, this plaintiff prays for the relief demanded in the amended complaint herein.

WINN & BURTON,
Attorneys for Plaintiff. [54]

United States of America,
District of Alaska,—ss.

I, William M. Ebner, being first duly sworn, on oath, say: That I am the president of the Ebner Gold Mining Company, plaintiff in the above-entitled ac-

tion; that I have read the foregoing reply and know the contents thereof, and believe the same to be true; that as such president I make this verification on behalf of said plaintiff company.

WM. M. EBNER.

Subscribed and sworn to before me this 3d day of June, A. D. 1911.

NEWARK L. BURTON,
Notary Public for Alaska.

[Endorsed]: Original. No. 835-A. In the District Court for the District of Alaska, Division No. 1, at Juneau. Ebner Gold Mining Co., Plaintiff, vs. Alaska-Juneau Gold Mining Co., Defendant. Reply. Filed May 19, 1911. E. W. Pettit, Clerk. John R. Winn, Newark L. Burton, Attorneys for _____. Office: Juneau, Alaska. Office No. _____. [55]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

No. 835-A.

EBNER GOLD MINING COMPANY, a Corporation,
Plaintiff,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendants.

**Order Granting Motion of Defendants to Make
Complaint More Definite.**

On this day this cause coming on for hearing upon the motion of defendant to make the complaint herein more definite and certain, the plaintiff being represented by J. R. Winn, Esquire, and the defendant being represented by William S. Bayless, Esquire, and J. A. Hellenthal, Esquire, after argument had, the Court, being fully advised in the premises, grants said motion, the plaintiff is allowed to amend by interlineation, and defendant is given until May 11, 1911, to answer.

Done in open Court this 3d day of May, 1911.

EDWARD E. CUSHMAN,

Judge.

Entered Court Journal H, page 85. [56]

In the District Court for the District of Alaska, Division No. 1.

No. 835-A.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Order Allowing Complaint as Amended.

On this day, the plaintiff being represented by Messrs. Winn & Burton, and the defendant being rep-

resented by J. A. Hellenthal, Esquire, and William S. Bayless, Esquire, it is ordered that the complaint as amended be, and the same is hereby allowed, and defendants are given until to-morrow to plead.

Done in open court this 8th day of May, 1912.

EDWARD E. CUSHMAN,

Judge.

Entered Court Journal H, page 95. [57]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

No. 835-A.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

**Order [Re Waiver by Defendant of Defense of
Another Action, etc.].**

J. R. Winn, Esquire, appearing for plaintiff, and L. P. Shackelford, Esquire, and J. A. Hellenthal, Esquire, appearing for defendant, the defendants waive the defense of another action pending for the trial of this cause at this term of court and upon appeal, but the right to raise it at any subsequent trial is reserved.

Done in open court this 16th day of May, 1911.

EDWARD E. CUSHMAN,

Judge.

Entered Court Journal H, page 126. [58]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

No. 835-A.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Order Overruling Plaintiff's Demurrer.

This cause coming on regularly for hearing upon the demurrer of plaintiff to defendant's further answer to the second cause of action stated in the amended complaint herein, J. R. Winn, Esquire, appearing for the plaintiff, and L. P. Shackelford, Esquire, and J. A. Hellenthal, Esquire, appearing for the defendant, after argument by respective counsel and the Court being fully advised in the premises, said demurrer is overruled, to which ruling plaintiff excepts and the exception is allowed.

Done in open court this 16th day of May, 1911.

EDWARD E. CUSHMAN,

Judge.

Entered Court Journal H, page 128. [59]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

No. 835-A.

EBNER GOLD MINING COMPANY, a Corporation,
Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,
Defendant.

**Order [Dismissing Third Cause of Action of
Amended Complaint Without Prejudice].**

Upon motion made by counsel for plaintiff in the above-entitled cause, in open court, in the presence of counsel representing the above-named defendant in said above-entitled cause, that the third cause of action set forth in the amended complaint herein be dismissed without prejudice, for the reason that upon an examination of the records of title it had been ascertained that the title to the Cape Horn Lode Mining Claim set up and described in said third cause of action in said amended complaint was in William M. Ebner and not in the Ebner Gold Mining Company, the party plaintiff herein;

And the Court being fully advised in the premises, IT IS ORDERED that said third cause of action in said amended complaint herein be, and the same is hereby, dismissed without prejudice to the bringing or commencement of another suit for the same cause or subject matter of said action.

Done in open court this 24th day of May, A. D. 1911.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Original. No. 835-A. In the District Court for the District of Alaska, Division No. 1, at Juneau. Ebner Gold Mining Co., Plaintiff, vs. Alaska-Juneau Gold Min. Co., Defendant. Order. Filed May 24, 1911. E. W. Pettit, Clerk. By ———, Deputy. John R. Winn, Newark L. Burton, Attorneys for ———. Office: Juneau, Alaska. Office No. ——. [60]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

No. 835-A.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Order Waiving Jury in Trial.

Now, on this day, J. R. Winn, Esquire, appearing for the plaintiff, and L. P. Shackelford, Esquire, and J. A. Hellenthal, Esquire, appearing for defendant, upon the consent of both parties hereto, in open court,

it is ordered that a jury be waived in the trial of this cause.

Done in open court this 15th day of May, 1911.

EDWARD E. CUSHMAN,
Judge.

Entered Court Journal H, page 120. [61]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

Case No. 835-A.

EBNER GOLD MINING CO., a Corporation,
Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Motion [to Insert Matter on Page 4 of Answer].

Comes now the defendant and makes application to the Court to insert the following on page 4 of the defendant's answer, immediately following paragraph 2 of the defendant's answer to the second cause of action:

"2d-b. And defendant further alleges as a further defense to said second cause of action that if the plaintiff ever acquired any interest in premises and mining claims set forth in said second cause of action, neither the plaintiff nor any of his grantors or predecessors in interest did or performed or caused to be performed any work, labor or improvements of any kind and nature or description, upon or for the use and

benefit of said Parish No. 2 lode claim under or by virtue of said alleged location of plaintiff, and that plaintiff and his grantors wholly failed and neglected to represent said claim or resume work thereon until long after the water and mining locations of defendant as hereinafter set forth and have *fail* to record the affidavit of annual labor and improvements required by Statute, and thereby the plaintiff's claim, if any he had, became and was actually forfeited."

Dated this 9th day of June, 1911.

HELLENTHAL & HELLENTHAL,
SHACKLEFORD & BAYLESS,

Attorneys for Defendant. [62]

[Endorsed]: Original. No. 835-A. In the District Court for the District of Alaska, Division No. 1. Ebner Gold Mining Co., Plaintiff, vs. Alaska-Juneau Gold Mining Co., Defendant. Motion. Filed June 9, 1911. E. W. Pettit, Clerk. J. A. Hellenthal, Attorney for Defendant. Office: Juneau, Alaska. [63]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

Case No. 835-A.

EBNER GOLD MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Order [Allowing Insertion of Matter on Page 4 of Answer].

This matter coming on on application of the defendant, the Court being fully advised, **HEREBY ORDER** that the following be inserted in the answer of the defendant herein on page 4, immediately following paragraph 2 of the defendant's answer to the second cause of action:

“2d-b. And defendant further alleges as a further defense to said second cause of action that if the plaintiff ever acquired any interest in premises and mining claims set forth in said second cause of action, neither the plaintiff nor any of his grantors or predecessors in interest did or performed or caused to be performed any work, labor or improvements of any kind and nature or description, upon or for the use and benefit of said Parish No. 2 lode claim under or by virtue of said alleged locations of plaintiff, and that plaintiff and his grantors wholly failed and neglected to represent said claim or resume work thereon until long after the water and mining locations of defendant as hereinafter set forth and have failed to record the affidavit of annual labor and improvements required by Statute and thereby the plaintiff's claim, if any he had, became and was actually forfeited.”

Done in open court this 9th day of June, 1911.

EDWARD E. CUSHMAN,

Judge.

To the foregoing order plaintiff excepts and its exception is allowed.

EDWARD E. CUSHMAN,
Judge. [64]

[Endorsed]: Original. No. 835-A. In the District Court for the District of Alaska, Division No. 1. Ebner Gold Mining Co., Plaintiff, vs. Alaska-Juneau Gold Mining Co., Defendant. Order. Filed June 9, 1911. E. W. Pettit, Clerk. J. A. Hellen-thal, Attorney for Defendant. Office: Juneau, Alaska. [65]

[Order Denying Findings.]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COM-
PANY, a Corporation,

Defendant.

This matter coming on upon the defendant's request for Findings and the Court being fully advised, denies the findings requested by the defendant other than those given in the findings already filed.

Done in open court this 5th day of July, 1911.

EDWARD E. CUSHMAN,
Judge.

To the foregoing order defendant excepts, which exception is allowed.

EDWARD E. CUSHMAN,
Judge.

Entered in Court Journal No. 11, page 271, Fairbanks, Alaska.

[Endorsed]: 1659. 835-A. Order Denying Findings (Deft's.). Filed in the District Court, Territory of Alaska, 4th Div. Jul. 5, 1911. C. C. Page, Clerk. By H. C. Green, Deputy. Filed Aug. 21, 1911. E. W. Pettit, Clerk. By C. Z. Denny, Asst. [66]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY, a Corporation,

Defendant.

Findings of Fact and Conclusions of Law.

This cause having heretofore come on for hearing upon the issues made by the amended complaint, the amended and supplemental answer and the reply to said amended and supplemental answer, a jury having been by the respective parties expressly waived, plaintiff having introduced all of its testimony and

rested its case, and the defendant having introduced all of its testimony and rested its case; plaintiff having introduced its rebuttal testimony and defendant having introduced its sur-rebuttal testimony, both parties having rested and argument of counsel representing the respective parties having been made, and the Court being fully advised in the premises, finds:

1. That the plaintiff, Ebner Gold Mining Company, is a corporation organized December 5, 1895, and existing under and by virtue of the laws of the United States provided for the District of Alaska; and is authorized to do and has been engaged in and doing a general mining business in said district for over fifteen years. Said plaintiff corporation is entitled to hold, deal in and acquire title from the United States to mineral lands and been qualified so to do at all times mentioned in the amended complaint herein. [67]

2. That the defendant is a corporation duly organized and doing business in the District of Alaska.

3. The Court further finds that the plaintiff is now and has been for several years last past seized in fee and possessed and entitled to the possession of that certain patented lode mining claim situated in the Harris Mining District, District of Alaska, namely, the Lotta lode mining claim, United States Mineral Survey No. 87, more particularly described as follows, to wit:

Beginning at Corner No. 1 Lotta lode claim (patented), a post at the NW. centre end of claim; thence north $57^{\circ} 24'$ east 150 feet to

Corner No. 2; thence south $31^{\circ} 36'$ east 1500 feet to Corner No. 3, identical with Corner No. 5 Taku Gold and Silver lode claim, Survey No. 88, patented, and Corner No. 1 Royal Lode Survey No. 238, patented; thence south $57^{\circ} 24'$ west 150 feet to southeast centre end of Lotta Lode, 300 feet to Corner No. 5, identical with Corner No. 5, Royal Lode, Survey No. 238, patented; thence east side doorway of old cabin, bears north $5^{\circ} 7'$ east 96.2 feet distance; thence north $31^{\circ} 36'$ west 1500 feet to Corner No. 6; thence north $57^{\circ} 24'$ East 150 feet to NW. centre end and place of beginning. Mag. Var. of all courses from a true meridian 32° east of north.

4. That while plaintiff was the owner of such mining claim and seized and possessed thereof, the defendant, early in August, 1910, without right or title, entered into possession of part of said Lotta mining claim and without right or title thereafter constructed thereon a portion of a certain dam, with structures accessory thereto, for the purpose of diverting the waters of Gold Creek flowing in, through and over said Lotta lode mining claim, and ousted and ejected plaintiff therefrom, and now wrongfully and unlawfully withholds the possession thereof from the plaintiff.

5. That the plaintiff is not and never has been seized, possessed or entitled to the possession of that certain tract of ground described in paragraph 3 of the plaintiff's second cause of action, set forth in the amended complaint herein, and known and referred to as the Parrish #2 lode mining claim. That the

ground claimed by the plaintiff as the Parrish #2 lode mining claim was located solely for purposes of convenience; that no [68] discovery of mineral-bearing rock in place, of any value, was ever made by the plaintiff or its grantors, nor any indication or evidence of such as could or would warrant or justify one in spending time, work or money in its development or in the expectation of finding ore.

6. The Court further finds that no assessment work required by law to the extent of \$100 each year has been performed or caused to be performed in labor and improvements of any kind or for the benefit and use of said Parrish #2 claim prior to the year 1909, and that the plaintiff and its grantors failed and neglected to sufficiently represent said claim during the years prior to 1909, after its attempted location in 1899.

The Court further finds that the annual assessment work and labor required by law has been done and performed upon the Parrish #2 lode mining claim for the years 1909 and 1910 and within the time in each of said years required by law, providing the same was a valid and subsisting mining claim, based upon a valid location.

7. The Court further finds that about the first day of August, 1910, while the waters of Gold Creek were flowing in their usual channel L. D. Mulligan, acting as the agent and employee of the defendant, posted a notice upon the property in controversy, said notice reciting the location by him of 20,000 miner's inches of the unappropriated waters of Gold Creek.

That thereafter the defendant proceeded to erect part of a dam and construct a flume upon the public domain, which flume and a portion of said dam were on, over and across the property claimed by the plaintiff as the Parrish #2 lode mining claim, and that at the time of said location and erection of said dam and flume and the diversion and appropriation of said water, the said [69] property so described as the Parrish #2 lode mining claim was a part of the unoccupied, unsegregated public domain of the United States, and that said flume extends across the said property indicated upon the map on file herein, known as Defendant's Exhibit #7, which for the purposes of description is made a part of this finding.

8. The Court finds that under the custom of miners which was and is generally observed by the miners of the Harris and surrounding mining districts, the Harris Mining district being the mining district in which all the property and property rights in controversy are situated, the appropriator of water has uniformly exercised the claimed right, without opposition, to build ditches and canals across unpatented mining claims owned and held by persons other than the appropriator, in order to convey water to the place of intended use, whether such water is diverted from the stream on the mining claim or such other or beyond the same.

9. The Court further finds that under the custom of miners, recognized by the miners of the district within which the property in controversy is situated, the riparian proprietor has no right to the use of

the water of the running streams by reason of such riparian ownership as against a prior appropriator, and the Court further finds that under the customs of miners observed by the miners of the district in which the property in dispute is situated, rights to the use of the waters of running streams may be acquired by diversion, appropriation and application to beneficial use. That the defendant went upon the property in controversy to construct a dam and flume for the purpose of diverting and appropriating water for use in furnishing power in connection with the operation of a stamp-mill to be constructed by it and for other uses in connection with [70] the operation of its mines in Silver Bow Basin, within the district drained by said Gold Creek.

10. The Court further finds that the Oregon mining claim referred to in defendant's answer as located by J. P. Corbus and the Oregon mining claim as located by R. G. Datson were each made solely for the purposes of convenience; that no discovery of mineral-bearing rock in place, of any value, was ever made by the defendant or its grantors, or at all, on either of said claims, nor any indication or evidence of such as would warrant or justify one in spending time, work or money in the development of either of such claims or with the expectation of finding ore.

11. The Court further finds that the Canyon mining claim is based upon a discovery within the boundary of the Lotta patented mining claim above described, and that said location is void and without effect.

And the Court concludes as a matter of law:

1. That the plaintiff is entitled to the possession of the Lotta mining claim and is the owner thereof as staked upon the ground and described in plaintiff's amended complaint, and is entitled to a decree ousting the defendant therefrom.

2. That the plaintiff is entitled to a writ of restitution and a writ of ejectment herein restoring the plaintiff to the possession of the Lotta patented claim, as more particularly set out in the Findings of Fact herein, said writ of ejectment to eject the defendant, its officers, agents and employees from said premises and each and every portion thereof.

3. That the location known as the Parrish #2 lode mining claim is void and of no effect. [71]

4. That the locations known as the Oregon lode mining claim, located by R. G. Datson, and the Oregon lode mining claim, located by J. P. Corbus, and the Canyon lode mining claim, located by W. R. Lindsey, are void and of no effect.

5. The Court further concludes that neither of the parties is entitled to recover costs in this suit.

Done in open court this 5th day of July, 1911, *nunc pro tunc* as of June 12, 1911.

EDWARD E. CUSHMAN,
Judge.

Entered in Court Journal No. 11, page 268, Fairbanks, Alaska.

[Endorsed]: 1659. 835-A. Findings of Fact and Conclusions of Law. Filed in the District Court, Territory of Alaska, 4th Div. Jul. 5, 1911. C. C.

Page, Clerk. By H. C. Green, Deputy. Filed Aug. 21, 1911. E. W. Pettit, Clerk. By C. Z. Denny, Asst. [72]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COM-
PANY, a Corporation,

Defendant.

Judgment and Decree.

This matter having come on for trial, plaintiff being represented by Messrs. Winn & Burton, the defendant by Messrs. Hellenthal & Hellenthal and Messrs. Shackleford & Bayless; evidence having been already taken, arguments heard and the cause submitted, and the Court having made its Findings of Fact and Conclusions of Law, and being fully advised in the premises:

It is ORDERED, ADJUDGED, CONSIDERED AND DECREED that the plaintiff have and recover of and from the defendant the possession of that certain lode mining claim known as the Lotta mining claim, United States Survey No. 87, and that the defendant be ejected from the possession of said mining claim, or so much of the same as it is in possession of,

which said lode mining claim is particularly described as staked upon the ground and more particularly as follows, to wit:

Beginning at Corner No. 1 Lotta lode claim (patented), a post at the NW. centre end of claim; thence north $57^{\circ} 24'$ east 150 feet to Corner No. 2; thence south $31^{\circ} 36'$ east 1500 feet to Corner No. 3, identical with Corner No. 5 Taku Gold & Silver lode claim, Survey No. 88, patented, and Corner No. 1 Royal lode, Survey No. 238, patented; thence south $57^{\circ} 24'$ west 150 feet to southeast centre end of Lotta lode, 300 feet to Corner No. 5, identical with Corner No. 5 Royal lode, Survey No. 238, patented; whence east side doorway of old cabin bears north $5^{\circ} 7'$ east 96.2 feet distance; thence north $31^{\circ} 36'$ west 1500 feet to Corner No. 6; thence north $57^{\circ} 24'$ east 150 feet to NW. centre end and place of beginning. Mag. Var. of all courses from a true meridian 32° east of north. [73]

It is further CONSIDERED, ORDERED, ADJUDGED AND DECREED that the plaintiff take nothing further by his complaint herein, and except as to the Lotta lode mining claim this cause and action be dismissed, without cost to either side.

The Court further retains and reserves jurisdiction in this cause for the purpose of supplementing, if the same hereafter appear necessary, this judgment with a fuller and more accurate description of the property referred to therein, and for the further purpose to determine to what exact extent the struc-

tures of the defendant are within the limits of the said Lotta Lode mining claim therein referred to.

Done in open court this 5th day of July, 1911, *nunc pro tunc* as of June 12, 1911.

EDWARD E. CUSHMAN,
Judge.

Entered in Court Journal No. 11, page 270, Fairbanks, Alaska.

[Endorsed]: 1659. 835-A. Judgment and Decree. Filed in the District Court, Territory of Alaska, 4th Div. Jul. 5, 1911. C. C. Page, Clerk. By H. C. Green, Deputy. Filed Aug. 21, 1911. E. W. Pettit, Clerk. By C. Z. Denny, Asst. [74]

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 835.

EBNER GOLD MINING COMPANY, a Corporation,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Order [Re Transfer of Files, from First to Fourth Division; Re Settlement of Findings, Entry of Judgment, Filing of Bill of Exceptions, etc.].

It being orally stipulated by counsel that the files in this cause may be transferred from the First to the Fourth Division, that the Court may there settle the findings and make and enter judgment and rule upon

the findings requested by either side; the papers to be then returned to the Clerk's office of the First Division for the final entry of judgment; that each side be allowed thirty (30) days from the return of the findings and judgment to the office of the Clerk of the court in the First Division, within which to prepare and file their written exceptions to such findings, judgment and decree; the Clerk to notify the attorneys of record on each side of the date of filing such findings, judgment and decree. That each side be allowed six (6) months from the date of the filing of the judgment in which to prepare, serve and file proposed bill of exceptions, if appeal or writ of error is desired to be sued out by either of such parties.

Upon such stipulation it is so ordered by the Court.

Done in open court this 12th day of June, 1911.

EDWARD E. CUSHMAN,
Judge.

Entered Court Journal H, page 188. [75]

*In the District Court for the Territory of Alaska,
Fourth Division.*

835-A.

EBNER GOLD MINING COMPANY,
Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation et al.,
Defendant.

**Order [Directing Return of Papers from Fourth to
First Division].**

Now on this day, it appearing to the Court that the

papers in this cause have heretofore been transferred from the Clerk's office of the First Division of the Territory of Alaska, to this court and now are in the possession of the Clerk of this court;

And it further appearing that the Honorable EDWARD E. CUSHMAN has filed his findings and judgment in said cause and other orders in connection therewith, and that there is no longer need of retaining said papers in this court;

NOW, THEREFORE, IT IS HEREBY ORDERED that the Clerk of this court retransfer all papers received by him from the Clerk of the District Court, Territory of Alaska, First Division, as well as the findings, judgment, and all papers in connection therewith.

Done in open court at Fairbanks, Alaska, this 10th day of July, 1911.

EDWARD E. CUSHMAN,
District Judge.

Entered in Court Journal No. 11, page 283, Fairbanks, Alaska.

United States of America,
Territory of Alaska,
Fourth Division,—ss.

I, C. C. Page, Clerk of the District Court, Fourth Division, Territory of Alaska, do hereby certify, that the above and foregoing is a full, true and correct copy, and the whole thereof, of the original Order in Cause 835-A, entitled: Ebner Gold Mining Company, a Corporation, Plaintiff, vs. Alaska-Juneau [76] Gold Mining Company, a Corporation et al., Defendant, as the same appears of record in my office.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of said Court, at Fairbanks, Alaska, this 24th day of July, 1911.

[Seal] C. C. PAGE,
Clerk of the District Court, Territory of Alaska,
Fourth Division.

By GEO. F. GATES,
Deputy.

[Endorsed]: Form No. 680. No. 835-A. In the District Court of the United States for the District of Alaska, 4th Div. Ebner Gold Mining Co., a Corporation, vs. Alaska-Juneau Gold Mining Co., a Corporation et al. Certified Copy Order Retraversing All Papers to Clerk of Court, for First Division. Filed Aug. 21, 1911. E. W. Pettit, Clerk. By C. Z. Denny, Asst. [77]

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corporation,
tion,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

**Order Allowing Plaintiff Until February 12, 1912,
to File Bill of Exceptions].**

The motion for plaintiff herein asking for sixty

days' additional time to that already granted herein for the purpose of preparing, serving and filing a bill of exceptions on appeal herein, coming on for hearing and the attorneys representing the respective parties being present, and after presentation of said motion and the Court being fully advised in the premises, HEREBY GRANTS AND ALLOWS the plaintiff sixty days' time after the 12th day of Dec., 1911, in which to prepare, serve and file its Bill of Exceptions herein.

Done in open court this 18 day of October, A. D. 1911.

T. R. LYONS,
Judge.

[Endorsed]: Original. No. 835-A. In the District Court for the District of Alaska, Division No. 1, at Juneau. Ebner Gold Mining Company, Plaintiff, vs. Alaska-Juneau Gold Mining Company, Defendant. Order. Filed Oct. 18, 1911. E. W. Pettit, Clerk. By ———, Deputy. John R. Winn, Newark L. Burton, Attorneys for ———. Office: Juneau, Alaska, Office No. ——. [78]

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corporation,
tion,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation.

**[Order Extending Time to May 12, 1912, to File Bill
of Exceptions.]**

This matter coming on for hearing on the motion and application of the above-named plaintiff for an extension of time in which to prepare, serve and file a bill of exceptions herein, and the plaintiff being represented by Messrs. Winn & Burton, and the defendant being represented by Messrs. Hellenthal & Hellenthal; after hearing read the affidavits filed herein and arguments of counsel, and the Court being fully advised;

It is hereby ORDERED, and the Court does hereby extend, the time in which to prepare and serve and file a bill of exceptions herein for the period of ninety days, commencing with the 12th day of February, 1912, or until May 12, 1912.

Done in open court this 10th day of February, 1912.

THOMAS R. LYONS,
Judge.

Entered Court Journal I, page 145. [79]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation.

Order [Extending Time to June 12, 1912, to File Bill of Exceptions].

On application of the Ebner Gold Mining Company, the plaintiff in the above-entitled cause, said plaintiff is given thirty days, commencing on and after the twelfth day of May, 1912, in which to present to the Court for allowing, signing and certifying a bill of exceptions herein; that is, the time is extended for said purpose until June 12, 1912.

Done in open court this 1st day of May, A. D. 1912.

THOMAS R. LYONS,

Judge.

Entered Court Journal No. I, page 277.

[Endorsed]: Filed May 1, 1912. E. W. Pettit,
Clerk. By ———, Deputy. [80]

*In the District Court for the District of Alaska,
Divison No. One, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Order Extending Time to June 30, 1912, to File Bill of Exceptions.

THIS MATTER coming on for hearing on motion of plaintiff in open court for the extension of the

time in which to file, present and have settled herein a bill of exceptions, and the parties being represented by their respective counsel, and the Court being fully advised in the premises, hereby extends the time of the presentation, settlement and allowance of a bill of exceptions herein until and including June 30th, A. D. 1912.

Done in open court this 25th day of May, A. D. 1912.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, May 25, 1912. Ed. M. Lakin, Clerk. By K. L. Monohan, Deputy. Filed May 28, 1912. E. W. Pettit, Clerk. By _____, Deputy. [81]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

**Motion and Request for Original Exhibits to be
Forwarded to Appellate Court.**

Comes now the above-named plaintiff, by its attorneys, Winn & Burton, and moves the Court for an

order making certain original exhibits part of the bill of exceptions herein, and that such original exhibits be attached to said bill of exceptions and such said original exhibits be forwarded to the Appellate Court, upon the following ground and for the following reason, viz.:

That such original exhibits would be difficult to duplicate and it would be impracticable to obtain copies of the same.

That such original exhibits desired by the plaintiff to be attached to said bill of exceptions and forwarded to the Appellate Court, are as follows:

“N”—Map of Ebner patented mining claims, also showing Parrish No. 2;

“M”—Photo showing tunnels;

“PP”—Photo;

“QQ”—Photo;

“3”—(Defendant’s Ex. 3)—Blue print showing Ebner Company’s mining claims;

“9”—Photo showing rock (so-called boulder);

“21”—Photo;

“66”—Plat of geological sketch map of upper part Gold Creek;

“68”—Photo;

“69”—Photo;

“70”—Photo, open cut.

WINN & BURTON,
Attorneys for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, May 23, 1912. Ed. M. Lakin, Clerk. By ————, Deputy. [82]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

**Order [Sustaining Objections of Defendant to
Certificate to Bill of Exceptions, etc.].**

This matter coming on for hearing on motion of Ebner Gold Mining Company, the plaintiff herein, by Winn & Burton, its attorneys, to make certain exhibits herein a part of the record on appeal, which said exhibits are set forth and described in the motion served herein on Hellenthal & Hellenthal, attorneys for defendant, on May 11, 1912, also on motion of said plaintiff for the settling, signing and allowing Bill of Exceptions herein, which said Bill of Exceptions was then and there presented to the Court under the certificate of Isaac Hamburger, official court stenographer, dated May 15, 1912; and the said defendant's objections to said motion and the said defendant's objections to the form of certificate requested by plaintiff to be signed by the Judge certifying to said tendered and offered bill of exceptions, in that said bill of exceptions did not contain a full transcript of all the testimony and evidence, and the Court after hearing counsel for the respective parties

sustains the said objections of the defendant and refuses to sign and certify said certificate to said bill of exceptions, for the reason that said bill of exceptions does not contain a transcript of all the testimony and evidence in said cause. To which ruling of the Court the plaintiff asks and is allowed an exception. [83]

Done in open court this 23d day of May, A. D. 1912.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, May 25, 1912. Ed. M. Lakin, Clerk. By K. L. Monohan, Deputy. Filed May 28, 1912. E. W. Pettit, Clerk. By ———, Deputy. [84]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Affidavit of John R. Winn [Filed May 25, 1912].

United States,

District of Alaska,—ss.

John R. Winn, being first duly sworn, on oath deposes and says: That I am one of the attorneys for the

above-named plaintiff and have resided in the town of Juneau, Alaska, for more than ten years last past, and that I am well acquainted with mining properties in Silver Bow Basin, near Juneau, Alaska, and am well acquainted with the Parrish No. 2 lode mining claim, the subject matter of litigation set forth in the second cause of action in the amended complaint herein, and have been acquainted with said lode claim for several years prior to the time of commencement of this action, and said lode mining claim is now and at all times mentioned herein has been and was at the time of the commencement of this action and at the time of the trial of said cause and the rendition of judgment herein, worth more than the sum of Five Hundred (\$500.00) Dollars.

JNO. R. WINN.

Subscribed and sworn to before me this 25th day of May, 1912.

R. J. BORYER,

Notary Public for the District of Alaska.

To the admission of which defendant objects for the reason that [85] the same is incompetent to prove any fact. Objection overruled and Exception allowed defendant.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, May 25, 1912. Ed. M. Lakin, Clerk. By K. L. Monohan, Deputy. Filed May 28, 1912. E. W. Pettit, Clerk. By ———, Deputy. [86]

In the District Court for the District of Alaska, Division No. 1.

CASE NO. 835-A.

THE EBNER GOLD MINING COMPANY,
Plaintiff,

vs.

THE ALASKA-JUNEAU GOLD MINING COMPANY,
PANY,

Defendant.

**Objections to Signing and Certifying to Bill of
Exceptions.**

Comes now the defendant and objects to the form of the certificate which plaintiff asks the Court to make to the proposed Bill of Exceptions, for the following reasons:

I.

The Court is asked to certify that the proposed is a full, true and correct bill of exceptions; in so far as it in any way affects, appertains or refers to the Parrish No. 2, Canyon and Oregon lode mining claims and the custom of miners with reference to the appropriation and acquisition of water and water right, and the crossing over mining claims and real estate owned by others, for the purpose of conveying such water to the place of use or contemplated use, where in truth and in fact it contains but a portion of the evidence which bears upon the ownership, right of occupation and *locus* of said Parrish No. 2, Canyon and Oregon lode claims and the custom of miners with reference to the appropriation and

acquisition of water and water right and the right of crossing mining claims of others with ditches and flumes, where it is necessary to do so in order to convey water so appropriated to the place of use or intended use, and on that account is not a true nor a full transcript of the evidence in this regard. It is only true as far as it goes. The affidavit of the Court Reporter who reported said cause, which is attached hereto and made a part hereof, shows that the proposed bill of exceptions is only a part of the evidence adduced at the trial of said cause, and that a full transcript would be about one-third longer, and would consist of about 1500 pages, typewritten. The [87] certificate should be that other and further evidence was introduced, and should not contain the statement that the proposed bill of exception is a full, true and correct bill, for the same is wholly untrue.

II.

Further objection is made to the certificate wherein the Court is asked to certify that the bill of exception as proposed contains all the evidence pertaining to the Parrish No. 2, Canyon and the Oregon mining claims, for the reason that the location, as located on the ground, of the Parrish No. 2 and the Oregon and the validity of the Canyon mining claim depends on the location of the Lotta as the said Lotta is located on the ground, none of which evidence is included in said proposed bill of exception, nor are the exhibits offered to show the *locus* of said Lotta, included or sought to be annexed to said proposed bill of exception.

III.

Further objection is made to that part of the certificate in which it is stated that said bill of exception contains all of the exhibits, for the reason that the exhibits sought to be annexed by the plaintiff are but a small portion of the exhibits introduced at the trial of said cause and the certificate in so far as said statement goes is wholly untrue.

IV.

Further objection is made for the reason that all the evidence introduced and exhibits offered bears and bear more or less upon the questions raised and tends to prove and establish the facts found and conclusions reached. While no doubt the Court Reporter intended to correctly certify upon the question, he was merely mistaken and misjudged the effect of the evidence and the questions in dispute, nor should this matter in anywise be based upon the judgment of the Court Reporter. It is for counsel to point out and for the Court to determine that the effect of the evidence is such as to place the Lotta patented mining [88] claim at a certain place upon the ground and what the evidence establishes and what evidence is material to establish a certain fact. It is neither fair to the Court nor to this defendant to present these questions on appeal without presenting to the other Court a full and complete transcript of all the evidence offered and exhibits introduced at the trial below upon which the findings and conclusions were based by the lower court. The Court is now asked to certify that a portion of the evidence considered at the trial by the Court in

reaching its findings and conclusions is all of the evidence that was considered. This would put the Court in an attitude of having made findings and having arrived at conclusions without evidence to support such findings and conclusions, when in fact the same were amply supported by evidence. Obviously this would be unfair, both to the Court and to this defendant. The certificate should state that the foregoing proceedings were had at the trial, but that they cover only a portion of the material proceedings had and evidence offered. And that the bill of exceptions as proposed is correct in so far as it goes, but that it is incomplete. Secondly, it may be further urged that the Court should not be asked that this small portion of the evidence offered as set up in the proposed bill of exceptions contains all the evidence that bears upon certain points or questions of fact. This is unfair unless the Court is furnished with and goes over a full transcript of the evidence heard at the trial. Neither Court nor counsel can be expected to remember for a year all of the evidence produced at the trial; especially is this true in this case as much evidence was offered. Yet the Court could not make the annexed certificate unless it so remembered. To rely upon the judgment of the Reporter in regard to what evidence is pertinent or not would simply be substituting the judgment of the Reporter for that of the Court. In this case, however, as we have shown, all the evidence offered at the trial below bears to some extent upon the matters sought to be reviewed, and no bill of exception would be complete unless it contained all the

evidence offered at the trial. [89]

SHACKLEFORD & BAYLESS,
HELLENTHAL & HELLENTHAL,
Attorneys for Defendant.

*In the District Court for the District of Alaska,
Division No. 1.*

CASE NO. 835-A.

THE EBNER GOLD MINING COMPANY,
Plaintiff,

vs.

THE ALASKA-JUNEAU GOLD MINING COM-
PANY,
Defendant.

Affidavit of Isaac Hamburger [Filed June 3, 1912].

United States of America,
District of Alaska,—ss.

I, Isaac Hamburger, being first duly sworn according to law, depose and say that I was the official Court Reporter at the trial in which the Ebner Gold Mining Company was plaintiff and the Alaska-Juneau Gold Mining Company was defendant, No. 835-A, of the records on file of said court, at Juneau; that from the best of my recollection, not having my notes with me to which I can refer, a full transcript of such record will cover about 1500 pages and may reach as high as 1600 pages; that from two-thirds to three-fourths of the evidence taken at the trial of said cause has been reduced to typewriting and is now incorporated in the Bill of Exceptions as proposed by the plaintiff.

ISAAC HAMBURGER.

Subscribed and sworn to before me the undersigned this 23d day of May, 1912, at Cordova, Alaska.

[Seal]

ED. M. LAKIN,

Clerk of the District Court, for the Territory of Alaska, Third Division. [90]

[Endorsed]: No. 835-A. In the District Court for the District of Alaska, Division No. 1. The Ebner Gold Mining Co., Plaintiff, vs. The Alaska-Juneau Gold Mining Co., Defendant. Objections to Signing Bill of Exceptions. Filed Jun. 3, 1912. E. W. Pettit, Clerk. By _____, Deputy. [91]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corporation,
Plaintiff,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

**Order [Making All Original Exhibits a Part of Bill
of Exceptions and Directing Transmission of
Same to Appellate Court].**

This matter coming on in open court on motion of the above-named plaintiff, by its attorneys, Winn & Burton, and said defendant being present by its attorneys, Hellenthal & Hellenthal, which said motion was in the way of a request to make certain exhibits a part of the Bill of Exceptions herein and to for-

ward certain of said exhibits with said Bill of Exceptions to the clerk of the Circuit Court of Appeals of the Ninth Circuit, and the Court being fully advised in the premises,

IT IS ORDERED that all original exhibits on file herein are made a part of the bill of exceptions to be signed, allowed and settled herein by the Court, and that the said originals be forwarded with said bill of exceptions to the Clerk of the Circuit Court of Appeals of the Ninth Circuit E. E. C. at San Francisco, California, including the following, to wit:

Defendant's Exhibit #50.

U. S. C. & G. S. Gastineau Channel, S. E. Alaska
marked "KK."

Defendant's Exhibit #11.

" " 6.

" " 7.

" " 2.

" " 12.

Notice of Location Water Right, Mulligan 8. [92]

Transcript Commissioner's Court, Juneau, in case U.

S. v. Angus Mackey et al.

62, Deed from J. P. Corbus to Alaska-Juneau Gold
Mining Co. conveying Oregon lode.

Warrant, Information and Complaint in case U. S.
v. Angus Mackey et al., Commissioner's Court,
Juneau.

Warrant in case U. S. vs. F. J. Wettrick, Commis-
sioner's Court, Juneau.

Warrant in case U. S. vs. Al Graham et al.

51, Proof of Labor, Idaho, Colorado, Oregon, Wyom-
ing, Nevada and Maryland lodes.

(S) Complaint, case U. S. vs. Al Graham et al., Commissioner's Court, Juneau.

Complaint, case U. S. vs. F. J. Wettrick, Commissioner's Court, Juneau.

Deed from W. R. Lindsay to Alaska-Juneau Gold Mining Company, Canyon lode.

#27, Field-notes, Colorado lode.

Certified copy by U. S. Surveyor-General May 24, 1911, map of Dora, Dora 2d, Dora 3d, St. Paul, Bluff, Humboldt, Webster Millsite, Ropeway, Etta, Forrest Lotta, Taku Gold and Silver, Keystone, Crown Point, and Golden Fleece lodes.

Plaintiff's Exhibit "B."

52, Proof of Labor, Idaho, Colorado, Oregon, Wyoming, Nevada and Maryland lodes.

Location Notice, Takou Gold and Silver lode dated Dec. 7, 1880 (certified copy).

53, Proof of Labor, Summit No. 1, Summit No. 2, Summit No. 3, Summit No. 4, Colorado, Oregon, Wyoming, Nevada and Maryland lodes.

54, Proof of Labor, Idaho, Colorado, Oregon, Wyoming, Nevada and Maryland lodes.

18, Deed from Mulligan to Alaska-Juneau Gold Mining Company conveying water right on Gold Creek.

Defendant's Exhibit 29. [93]

Defendant's Exhibit 28.

Defendant's Exhibit 30.

35, Certified copy Location of Water by Mulligan.

65, Certified copy Location Notice Lotta Lode.

59, Sketch Map of Gold Creek Bulletin No. 287 Pl. XV U. S.

Geological Survey.

Defendant's Exhibit 4.

61, Certified copy Minutes of Miners' Meeting February 18, 1882, Harris Mining District.

"II," Map showing property of Alaska-Juneau Gold Mining Company with proposed improvements.

25, Certified copy Notice of Location Canyon Lode.

B, U. S. Patent (Certified copy), Samuel Coulter, for Lotta, Takou Gold and Silver, Keystone, Crown Point, Golden Fleece, Grand Review and Jewel lode Mining claims.

Plaintiff's Exhibit "AA" and

Plaintiff's Exhibit "BB."

Plaintiff's Exhibit "EE."

Defendant's 41.

W (Photograph).

U " "

Plaintiff's Exhibit "FF."

Ex. 12 (Photograph).

Plaintiff's Exhibit "HH."

Plaintiff's Exhibit "GG."

"J" (Photograph).

"K" " "

"L" " "

"I" " "

71 " "

Plaintiff's Exhibit "H."

"V" (Photograph). [94]

67, Bulletin No. 287, Pl. XIX U. S. Geological Survey showing Rock slide Last Chance Basin.

22 (Photograph).

19 " "

Defendant's Exhibit 16.

20 (Photograph).

23 “

10 “

24 “

“NN” Bulletin No. 287, Pl. X U. S. Geological Survey showing Ebner Stamp-mill, etc.

13 (Photograph).

Defendant's Exhibit 15.

Defendant's Exhibit 14.

“ “ 26.

Plaintiff's Exhibit “N.”

Defendant's Exhibit 3.

Plaintiff's Exhibit “PP.”

“ “ “M.”

“ “ “QQ.”

9 (Photograph).

21 “

66, Bulletin No. 287, P. IX U. S. G. S. Geological Sketch Map of Upper part of Gold Creek.

68 (Photograph).

69 “

70 “

Deed from Alaska-Juneau Gold Mining Co. to Ebner Gold Mining Co., conveying conflict between Parrish No. 1 and Colorado lodes.

Resolution authorizing the President and Secretary of Alaska-Juneau Gold Mining Company to execute deed for above conflict to said Ebner Gold Mining Company.

Contract of Alaska-Juneau Gold Mining Company agreeing to convey [95] to the Ebner Gold

Mining Company conflict between Parrish lode claim and Colorado lode.

Also the following papers, etc., are made a part of the record and bill of exceptions herein, to wit:

Motion for New Trial.

Findings of Fact and Conclusions of Law offered by the plaintiff.

Objections to proposed Findings of Fact and Conclusions of Law offered and tendered by the defendant.

Objections and Exceptions to Findings and Conclusions made by the Court.

Exceptions to refusal of the Court to make certain Findings and Conclusions offered by the plaintiff and to modification of same by the Court.

Location Notice, Parrish No. 2 lode claim.

Deed of said Parrish No. 2 lode claim from William Ebner to Ebner Gold Mining Company.

Contract, Deed and Resolution in re conflict Parrish No. 1 with Colorado lode claim.

Answer and oral opinion in Cause No. 803-A.

Copy of page 99 of the ledger of Ebner Gold Mining Company.

Done in open court this 25th day of May, 1912.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, May 25, 1912. Ed. M. Lakin, Clerk. By K. L. Monohan, Deputy. Filed May 28, 1912. E. W. Pettit, Clerk. By _____, Deputy. [96]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

EBNER GOLD MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Assignment of Errors.

Comes now the above-named plaintiff, Ebner Gold Mining Company, and assigns the following errors committed by the Court on the trial and determination of the above-entitled cause and upon the rendition of a judgment herein dismissing plaintiff's cause of action No. 2 set forth in amended complaint herein pertaining to the Parrish No. 2 lode mining claim, and upon which plaintiff relies in the Appellate Court, to wit:

I.

The Court erred in overruling and denying plaintiff's motion to strike from defendant's answer all those portions of the same and each and every part thereof moved against in the motion of plaintiff filed herein on May 15, 1911.

II.

The Court erred in overruling plaintiff's demurrer to the defendant's further answer to the second cause of action stated in the amended complaint, and also plaintiff's demurrer to defendant's answer

to the third cause of action stated in the amended complaint; which said demurrer is filed herein on May 16, 1911.

III.

The Court erred in allowing the defendant herein after [97] the trial of said cause to amend its answer herein by pleading a noncompliance of plaintiff in performing the annual assessment work upon the Parrish No. 2 lode mining claim, and pleading a forfeiture thereof; which said amendment was filed on June 9th, 1911.

IV.

The Court erred in permitting the defendant upon the trial of said cause, over the objections of the plaintiff, to introduce evidence with reference to the appropriation and acquisition of water and water rights and the conveying of such water by flume, pipe, or ditch line across mining claims and real estate of others and conveying such water to the place of use or intended use of such appropriator. The introduction of such evidence and testimony to establish any such custom among miners of South-eastern Alaska, and in Harris Mining District, was all admitted over the objections and exceptions of the plaintiff.

V.

The Court erred in not making, signing and filing the following findings of fact and conclusions of law offered and tendered by the plaintiff herein respecting Parrish No. 2 lode mining claim, to wit:

Finding No. 4 offered and tendered by plaintiff

herein, which said finding is substantially as follows:

“That the plaintiff is now and has been for several years last past, seized, possessed and entitled to the possession and the owner by discovery, location, staking and marking of the boundaries and recording by its grantors and predecessors in interest and by a full compliance with the laws of the United States and doing and performing of the annual assessment work each and every year of the Parrish No. 2 lode mining claim, etc.”

And in not making and signing and filing Finding No. 5, offered and tendered by plaintiff, which requested the Court to [98] find:

“That while plaintiff was so seized and possessed and entitled to the possession of the Parrish No. 2 lode mining claim, the defendant some time in the month of August, 1910, and before the commencement of this action, without right or title, entered into possession of part of Parrish No. 2 lode mining claim and ousted and ejected plaintiff therefrom, and now unlawfully and wrongfully withholds the possession thereof from the plaintiff.”

And in not making, signing and filing Finding No. 6, offered and tendered by the plaintiff herein, which is substantially as follows:

“The Court further finds that at the time of the commencement of this action and for several years prior thereto the plaintiff was the owner and entitled to the possession of said Parrish No. 2 lode mining claim as against the defendant and all persons and corporations whomsoever, and all of the

service ground thereof.”

“The court also erred in not making the Findings of Fact tendered and requested by plaintiff which are as follows:

(a) “The Court further finds that the annual assessment work and labor required by law has been done and performed upon the Parrish No. 2 lode mining claim for the years 1907, 1908, 1909 and 1910 and within the time in each of said years required by law.”

(b) “The Court further finds that the annual assessment work required by law has been done and performed upon the Parrish No. 2 lode mining claim for the years of 1908, 1909 and 1910.”

(c) “The Court further finds that the annual assessment work and labor has been done and performed upon the Parrish No. 2 lode mining claim each and every year since its location in the year of 1899.” [99]

VI.

The Court erred in not making, signing and filing Conclusions of Law No. 1 and 2 offered and tendered by plaintiff, which in substance requested the Court to conclude that the plaintiff was entitled to a writ of ejectment ejecting said defendant from Parrish No. 2 lode mining claim, and granting a restraining order against the defendant restraining it from anywise interfering with plaintiff's possession of Parrish No. 2 lode mining claim.

VII.

The Court erred in making and rendering its Finding No. 5, which is as follows:

“That the plaintiff is not and never has been seised, possessed or entitled to the possession of that certain tract of ground described in paragraph III of the plaintiff’s second cause of action, set forth in the amended complaint herein and known and referred to as Parrish No. 2 lode mining claim. That the ground claimed by the plaintiff as Parrish No. 2 lode mining claim was located solely for purposes of convenience; that no discovery of mineral-bearing rock in place of any value was ever made by the plaintiff or its grantors, nor any indication or evidence of such as could or would warrant or justify one in spending time, work or money in its development or in the expectation of finding ore.”

Also in making Finding No. 6, wherein the Court finds in substance that plaintiff did not, prior to the year 1909, perform the necessary assessment work on Parrish No. 2 lode mining claim.

The Court also erred in making all that part of Finding No. 7 in which it finds that the defendant proceeded to erect a part of a dam on the public domain and that at said time the property described in Parrish No. 2 lode mining claim was a part of [100] the unoccupied and unsegregated public domain of the United States. All of which said findings were against law and without any evidence to support the same, and in many respects against all of the evidence in said cause and against the admitted facts by both plaintiff and defendant in the pleadings and upon the trial and hearing of said cause.

VIII.

The Court further erred in making the following findings: Finding No. 8, in which the Court finds in substance that under the custom of miners of Harris Mining District, being the District in which Parrish No. 2 lode mining claim is located, that appropriators of water had uniformly the right to build ditches, etc., across unpatented mining claims owned and held by other persons, etc., and also Finding No. 9, in which the Court finds substantially that under the custom of miners the riparian proprietor has no right to the use of water of running streams by reason of such riparian ownership, as against a prior appropriator, and that the defendant went upon Parrish No. 2 lode mining claim to construct a dam, etc., for the purpose of diverting and appropriating the water to be used in running of a stamp-mill, etc.; for the reason that each and all of said findings are against law, unsupported by the evidence, and against the great preponderance of evidence and against the uncontradicted facts in the case.

IX.

The Court erred in making his Conclusion No. 3, which reads as follows:

“That the location known as Parrish No. 2 lode mining claim is void and of no effect.”

Said conclusion is without any evidence to support the same. The Court further erred in making Conclusion No. 5, which reads as follows:

“The Court further concludes that neither of

the parties is entitled to recover costs in this suit.” [101]

—for the reason that said conclusion is unsupported by the evidence and against law—the Court having granted affirmative relief to the plaintiff and adjudged it to be the owner of the Lotta lode mining claim set forth and described in the first cause of action in the amended complaint, and by reason of this the plaintiff was entitled to recover its costs in said action.

X.

The Court erred in that part of the judgment and decree in said cause wherein it adjudged and decreed as follows:

“It is further considered, ordered, adjudged and decreed that the plaintiff take nothing further by his complaint herein and except as to the Lotta lode mining claim, this cause and action be dismissed without costs to either side.”

XI.

The Court erred in overruling the motion of plaintiff for new trial herein.

XII.

The Court erred in not signing, settling and allowing the bill of exceptions presented for said purpose on the 23d day of May, 1912.

WINN & BURTON,

Atty. for Plaintiff in Error.

Service of the foregoing assignment of errors admitted this 25 day of May, 1912.

HELLENTHAL & HELLENTHAL,

Attorneys for Defendant in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, May 25, 1912. Ed. M. Lakin, Clerk. By K. L. Monohan, Deputy. Filed May 28, 1912. E. W. Pettit, Clerk. By ———, Deputy. [102]

*In the District Court for the District of Alaska,
Division No. 1.*

Case No. 835-A.

EBNER GOLD MINING COMPANY,
Plaintiff,
vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
Defendant.

Petition for Writ of Error and Allowance Thereof.
To the Honorable E. E. CUSHMAN, Judge of the
District Court for the District of Alaska:

Now comes the above-named Ebner Gold Mining Company, a corporation, plaintiff, by its attorneys, Winn & Burton, and complains that in the record and proceedings had in said cause and also in the rendition of the judgment in the above-entitled cause in the District Court for the District of Alaska, Division No. 1, against the said plaintiff on the 5th day of July, 1911, wherein said Court ordered said cause dismissed as to Parrish No. 2 lode claim, manifest error hath happened to great damage of said plaintiff, as will more fully appear from the assignments of error filed herewith.

Wherefore the defendant prays for the allowance

of a Writ of Error and for an order fixing the amount of bond in said cause, and for such other orders and process as may cause the said errors to be corrected by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this — day of May, A. D. 1912.

WINN and BURTON,
Attorneys for Plaintiff.

The above petition for Writ of Error is allowed and the bond fixed at Two Hundred and Fifty Dollars (\$250.00). To be approved by the Clerk of the above-entitled Court.

EDWARD E. CUSHMAN,
Judge. [103]

Service by copy admitted this 25 day of May, 1912.

HELLENTHAL & HELLENTHAL,
Atty. for Def.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division, May 25, 1912. Ed. M. Lakin, Clerk. By K. L. Monohan, Deputy. Filed May 28, 1912. E. W. Pettit, Clerk. By ———, Deputy. [104]

*In the District Court for the District of Alaska,
Division No. 1.*

CASE NO. 835-A.

EBNER GOLD MINING COMPANY,
Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
Defendant.

Bond on Writ of Error.

No all men by these presents: That Ebner Gold Mining Company, corporation, principal, and R. P. Nelson, as surety, are held and firmly bound unto Alaska-Juneau Gold Mining Company, a corporation, the above-named defendant, its successors in office, or assigns, in the full sum of Two Hundred and Fifty Dollars (\$250.00), for which payment well and truly to be made we bind ourselves and each of ourselves, our heirs, representatives, administrators, executors, successors in office, and assigns firmly by these presents.

Sealed with our seals and dated this 7th day of June, A. D. 1912.

The condition of the above obligation is such, that whereas the above-named Ebner Gold Mining Company, the above-named plaintiff, has sued out a Writ of Error, to the United States Circuit Court of Appeals for the 9th Circuit, to reverse the judgment in the above-entitled cause by the District Court for the District of Alaska, Division No. 1, in so far as such judgment effects the title of the said plaintiff in and to the Parrish No. 2 lode claim.

Now, therefore, the condition of this obligation is such, that if the above-named Ebner Gold Mining Company a corporation, plaintiff, shall prosecute its Writ of Error to effect and answer all damages and costs if it fails to make good its plea, then this obligation shall be void; otherwise to remain in full

force and virtue. [105]

EBNER GOLD MINING COMPANY,

Principal.

By JNO. R. WINN,

Atty.

R. P. NELSON,

Surety.

United States of America,

District of Alaska,—ss.

R. P. NELSON

Being first duly sworn, on oath deposes and says: I am a resident and householder of the District of Alaska and am not an Attorney or Counsellor at Law, Marshal, Deputy Marshal, Commissioner, Clerk of any court, or other officer of other courts, and am worth a sum of \$500.00 over and above all my just debts and liabilities, and exclusive of property exempt from execution.

R. P. NELSON.

Subscribed and sworn to before me this 7th day of June, 1912.

[Seal]

JNO. R. WINN,

Notary Public for Alaska.

The above and foregoing Bond is hereby approved as to form and sureties this 8th day of June, 1912, in accordance with order of Court made May 25, 1912, at Cordova, and filed May 28, 1912, at Juneau, Alaska.

[Court Seal]

E. W. PETTIT,

Clerk of District Court, Dist. of Alaska, Division
No. 1.

[Endorsed]: 835-A. In the District Court for the District of Alaska, Division No. 1. Ebner Gold Mining Co., a Corp. vs. Alaska-Juneau Gold Mg. Co., a Corp. Bond on Writ of Error. Filed Jun. 8, 1912. E. W. Pettit, Clerk. By ———, Deputy. [106]

Filed in the District Court, Territory of Alaska, Third Division. May 25, 1912. Ed. M. Lakin, Clerk. By K. L. Monohan, Deputy.

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States of America, to
the Hon. E. E. CUSHMAN, Judge of the Dis-
trict Court for the District of Alaska, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in said District Court, Division No. 1 thereof, before you, between Ebner Gold Mining Company, a corporation, plaintiff, and Alaska-Juneau Gold Mining Company, a corporation, defendant, a manifest error hath happened, to the great prejudice and damage of

the said plaintiff as set forth and appears by the petition herein.

We being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, in the State of California, together with this writ, so as to have the same at the said place and said Circuit on or before thirty days from the date hereof that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct those errors what of right, and according to the laws and customs of the United States, should be done. [107]

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 25th day of May, A. D. 1912.

Attest my hand and the seal of the District Court for the District of Alaska, Division No. 1, at the Clerk's office at Juneau on the day and year last above written.

[Seal]

E. W. PETTIT,

Clerk of the District Court for the District of Alaska,
Division No. 1.

Allowed this 25th day of May, A. D. 1912.

EDWARD E. CUSHMAN,

Judge.

Due service of the within writ of error acknowledged this 25th day of May, A. D. 1912.

HELLENTHAL & HELLENTHAL,

Attorneys for Defendant. [108]

Filed May 28, 1912. E. W. Pettit, Clerk. By
———, Deputy. [109]

Filed in the District Court, Territory of Alaska,
Third Division. May 25, 1912. Ed. M. Lakin,
Clerk. By K. L. Monohan, Deputy.

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Citation on Writ of Error.

The President of the United States to Alaska-
Juneau Gold Mining Company, a Corporation,
and the Above-named Defendant, Greeting:

You are hereby cited and admonished to be and ap-
pear at the United States Circuit Court of Appeals
for the Ninth Circuit, to be holden at the city of San
Francisco, in the State of California, within thirty
days from the date of this citation, pursuant to a writ
of error filed in the Clerk's office of the District Court

for the District of Alaska, Division No. 1, wherein Ebner Gold Mining Company is plaintiff and plaintiff in error, and you, the said Alaska-Juneau Gold Mining Company, defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, this 25th day of May, A. D. 1912, and of the Independence of the United States the 136th.

EDWARD E. CUSHMAN,
Judge.

Due and personal service of the foregoing citation is hereby admitted on behalf of Alaska-Juneau Gold Mining Company, defendant in error, this 25 day of May, 1912.

HELLENTHAL & HELLENTHAL,

Attorneys for said Defendant in Error. [110]

Filed May 28, 1912. E. W. Pettit, Clerk. By

———, Deputy. [111]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

**Order Extending Time Until June 24, 1912, to File
Record on Appeal.**

This matter coming on for hearing on motion in open court and the respective parties being represented by their counsel, and the motion of plaintiff to extend the time of thirty days mentioned in the citation in which to file with the Clerk of the Circuit Court of Appeals the record herein to a period of sixty days, is allowed. That is, the plaintiff in error is given until the 24th day of July, 1912, for the purpose above indicated, and the defendant in error is given until said time to appear at the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California.

Done in open court this 25th day of May, A. D.
1912.

EDWARD E. CUSHMAN,
Judge.

To the allowance of which the defendant excepts, for the reason that it is beyond the power of this court to extend the time beyond July 5th, 1912, said date

being a year after the signing of the judgment herein.

Objection overruled and exception allowed defendant.

EDWARD E. CUSHMAN,
Judge.

Filed in the District Court, Territory of Alaska,
Third Division. May 25, 1912. Ed. M. Lakin,
Clerk. By K. L. Monohan, Deputy. [112]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

**Objections to Proposed Findings of Fact and Con-
clusions of Law Offered and Tendered by De-
fendant.**

I.

Comes now the above-named plaintiff by its attor-
neys, Winn & Burton, and objects to Finding of Fact
No. 4, offered and tendered by the said defendant, for
the reason that the same is against the law and evi-
dence offered upon said trial and is not supported by
the evidence, and is against and not within the scope
of the oral decision rendered by the Court in said
cause, in that the said oral decision so made and ren-

dered by the Court in reference to the said Parish No. 2 lode claim only holds, and the Court only stated, that said location was invalid on the ground that the land claimed within the exterior boundary lines of said Parish No. 2 lode mining claim was not mineral ground, and that there was no sufficient discovery of valuable mineral by the locator to warrant a location of said claim as a mineral claim; and further, the Court did not state in its oral opinion that the plaintiff and its grantors had failed to do the assessment work on said Parish No. 2 lode claim.

II.

Said plaintiff also objects to Findings Nos. 5, 6, 7 so offered and tendered by defendant, for the reason and upon the ground that there is no evidence to support the same, and that the said oral decision rendered by the Court did not refer to the matters therein stated, and said findings are immaterial and redundant, and not within the scope of the matters being litigated; [113] that the Court did not attempt to pass upon the respective rights of the plaintiff and defendant to any water of Gold Creek, nor did the Court attempt to pass upon the question as to whether or not there were any miners' rules, regulations or customs in force which had any bearing upon the question or questions or property that was being litigated, and that said findings are unnecessary, for the reason that said Parish No. 2 lode claim was only found to be invalid by reason of the facts set forth in the foregoing objection set out in preceding paragraph.

III.

The plaintiff specially objects to the tendered Finding No. 8 of the defendant, wherein the defendant attempts to have the Court state that it made an inspection of the property in litigation but only examined the discovery of the plaintiff and made no attempt to examine the discovery made upon the Oregon lode claim located by Corbus, when, as a matter of fact, there is no evidence to support such finding whatsoever, and it will be presumed that the Court in visiting the property in litigation made an examination of all the objects upon the ground and place and places upon the ground that would throw any light whatever upon the matter being investigated and matters in dispute.

IV.

Plaintiff also objects to the finding which defendant offered following Finding No. 8 offered by said defendant, which is unnumbered, and especially that part of said finding so offered that reads as follows: "The Court further finds that the Oregon Mining Claim referred to in the defendant's answer as located by J. P. Corbus and the Oregon Mining Claim as located by R. G. Datson were made for the purpose of convenience," for the reason that the Court in its oral decision found that said locations so made by Corbus and Datson were made without any discovery, and especially without a discovery of mineral-bearing rock in place, and that there was no proof that said ground was mineral ground. This plaintiff does not object to that part of said finding wherein the Court [114] is requested by defendant to find

“that the Canyon mining claim is based upon a discovery within the boundaries of the Lotta patented mining claim within described and is void and without effect.”

I.

And this plaintiff objects to Conclusions of Law numbered 2 and 4, for the reason that said conclusions of law are not supported by the findings of fact and conclusions of law, and the same are not supported by any evidence or facts in the case.

II.

And the plaintiff also objects to each and all of the findings of fact which defendant offered to the Court and included on *their* answer in this cause, and to each and all and every of said so offered and tendered findings, upon the ground and for the same reasons urged in objections numbered I, II, III, and IV as set forth herein.

WINN & BURTON,

Attorneys for Plaintiff.

Due service of a copy of the within objections is admitted this 15 day of June, 1911.

SHACKLEFORD & BAYLESS,

Attorneys for ———.

[Endorsed]: Original. No. 835-A. In the District Court for the District of Alaska, Division No. 1, at Juneau. Ebner Gold Mining Company, Plaintiff, vs. Alaska-Juneau Gold Mining Co., Defendant. Objections. Filed Jun. 15, 1911. E. W. Pettit, Clerk. By J. J. Clarke, Deputy. John R. Winn, Newark L. Burton, Attorneys for ———. Office: Juneau, Alaska. Office No. ——. [115]

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. June 15, 1912. Ed. M. Lakin, Clerk.

*In the District Court for the District of Alaska,
First Division, at Juneau.*

No. 835-A.

EBNER GOLD MINING COMPANY, a Corpora-
tion,

Plaintiff,

vs.

ALASKA-JUNEAU GOLD MINING COMPANY,
a Corporation,

Defendant.

Bill of Exceptions and Transcript of Evidence.

Be it remembered, that the above-entitled cause came on duly and regularly to be heard on Tuesday, the 23d day of May, 1911, before the Honorable EDWARD E. CUSHMAN, Judge of the District Court for the District of Alaska and assigned to the Third Division, trying said cause by agreement of counsel:

The plaintiff being represented by its attorneys and counsel, Messrs. WINN & BURTON.

The defendant being represented by its attorneys and counsel, Messrs. SHACKLEFORD & BAYLESS and Messrs. HELLENTHAL & HELLENTHAL.

Opening statements were made to the Court by Mr. Winn in behalf of the plaintiff and by Mr. Shackelford in behalf of the defendant.

Whereupon the following proceedings were had:
[117]

[Testimony of William M. Ebner, for Plaintiff.]

WILLIAM M. EBNER, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Judge WINN.)

Q. Your name is William M. Ebner?

A. Yes, sir.

Q. Where do you reside now?

A. I reside in Hollywood, California.

Q. How long since you took up your residence in that place? A. About eight months.

Q. Prior to that time, where did you reside, Mr. Ebner? A. Juneau, Alaska.

Q. How long did you reside in Juneau, Alaska?

A. Ever since 1890.

Q. Up until about eight months ago?

A. Up until about eight months ago—that was our home,—Juneau was our home.

Q. What, over this period of time that you were in Alaska, were you engaged in? A. Mining.

Judge WINN.—We have some record evidence now. We will offer in evidence a certified copy of the Articles of Incorporation of the Ebner Gold Mining Company.

Mr. SHACKLEFORD.—We object to the introduction of the articles offered for the reason that it appears that the same are executed on the 3d of December, 1895, at a time when there was no act au-

(Testimony of William M. Ebner.)

thorizing the incorporation of companies in the District of Alaska; and for the further reason that the articles purport to have been organized under the laws of the State of Oregon and were not filed with the officers with whom such articles were required to be filed under the [118] laws of the State of Oregon, nor with any officers in the District of Alaska that corresponded with the officials designated in the incorporation act of the State of Oregon in force and effect at that time.

By the COURT.—You expect to follow this up with evidence that this company has done business as a corporation since the time—

Judge WINN.—Ever since its organization down to the present time and is still doing business.

Objection overruled. To which ruling of the Court counsel for defendant then and there duly excepted and the exception was by the Court allowed.

Mr. SHACKLEFORD.—We further object to the articles on the ground that the same purport to have been executed under the laws of the State of Oregon and that the company has not qualified within the District of Alaska as a foreign corporation, nor as a domestic corporation.

By the COURT.—That does not affirmatively appear—the objection will be overruled. To which ruling counsel for defendant is allowed an exception.

The articles are admitted in evidence and marked Plaintiff's Exhibit "A."

Mr. SHACKLEFORD.—We further object to the articles for the reason that they appear to have been

(Testimony of William M. Ebner.)

filed only with the Surveyor-General or *ex officio* Secretary of the District of Alaska.

Judge WINN.—We will prove that they were recorded in the Commissioner's office down here which corresponds with the recorder's office—we will prove that by Mr. Winn, the commissioner. [119]

Judge WINN.—We now offer in evidence a certified copy of the survey, of the plat under which all of the property that now belongs and is owned by the Ebner Gold Mining Company, all the patented property, is included and we expect to follow that up by mesne conveyances from the parties down to the Ebner Company, which includes the Lotta; they were conveyed right straight down from the original owner to the company.

Mr. SHACKLEFORD.—We object to the introduction of this plat for the reason that the matter has gone to patent and all the proceedings in the Land Department, whatever they may be, have merged in the patent; the patentee is bound by the notes as given in the patent regardless of what the notes may have been on this plat.

By the COURT.—You are offering this now as a chart to be used for the purpose of illustration in connection with the testimony or are you offering it as independent evidence?

Judge WINN.—We are offering it for both purposes. The patent was granted on this survey, and we also offer it in illustrating the testimony, in tying up the Parish claim, etc.

By the COURT.—It will be admitted. Is it certi-

(Testimony of William M. Ebner.)

fied in such shape as to show it was the plat on which the patents were admitted?

Judge WINN.—Yes, sir; if it is not certified to we will make it show that that is the survey on which the patent was granted.

Mr. HELLENTHAL.—I guess there is no question about that. We except to its admission only in so far as it is proposed to be used to modify or explain or in any wise vary or contradict the terms of the patent itself. [120]

Exception allowed. The plat is marked Plaintiff's Exhibit "B" and admitted in evidence.

Judge WINN.—I desire to withdraw Mr. Ebner for a moment and call Mr. Grover Winn.

[Testimony of Grover C. Winn, for Plaintiff.]

GROVER C. WINN, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Judge WINN.)

Q. What is your name? A. Grover C. Winn.

Q. What official position do you hold in the District of Alaska?

A. United States Commissioner, District of Juneau.

Q. How long have you been United States Commissioner? A. Since the third of August, 1910.

Q. You are also *ex officio* recorder? A. Yes, sir.

Q. Of this district? A. Yes, sir.

Q. You have in your custody and under your control the books and records of the Juneau Recording

(Testimony of Grover C. Winn.)

District? A. I have.

Q. I will ask you if this book which I exhibit to you, which is called Record #7, dated on the back December, 1889, to March, 1891, #7 Deeds and Mortgages—I will ask you if that is one of the books of record that belongs to your office. A. It is.

Q. I will ask you to turn to pages 143 to 147 in that book.

(Witness does so.)

Judge WINN.—We now offer in evidence the United States patent to Samuel Coulter for the mining claims set forth and described [121] in the map and plat which we have offered in evidence in this case. One among the claims, the Lotta, which is designated as U. S. Survey #87 and is the patent that was granted upon the survey as made as indicated in this exhibit “B” which we have offered in evidence.

Mr. HELLENTHAL.—No objection if you admit the whole patent; there is a plat attached to it?

Judge WINN.—There is a plat attached to it which is a counterpart of the plat offered in evidence. We offer in evidence the patent and also the plat attached to it and is part of the patent.

Admitted in evidence and marked Plaintiff’s Exhibit “C,” the understanding being that the commissioner will furnish a certified copy of the patent record, including the plat.

Q. Now, I will ask you if this record book is one of the books which forms part of the records of your office? A. It is.

(Testimony of Grover C. Winn.)

Judge WINN.—We offer in evidence now a deed commencing on page 483 of this book from Samuel Coulter and H. E. Coulter, his wife, of the City of Portland, Oregon, to the Taku Mining Co.—Taku Mining & Milling Co., a corporation. This is dated on the 20th day of August, 1889, and is a direct deed from the patentee of these claims in question and which is included in the patent.

By the COURT.—It includes all of them?

Judge WINN.—Yes, sir.

Mr. HELLENTHAL.—We object on the ground that the grantee has no capacity to hold property or take property.

By the COURT.—Do you propose to offer in evidence either the articles of incorporation of that company or show it was a [122] *de facto* company doing business for a number of years as a corporation in this vicinity?

Judge WINN.—The Taku Mining & Milling Co. is a corporation duly organized and existing under the laws of the State of Oregon. The deed on its face is affirmative evidence that they had a right to convey, etc.

Objection overruled. Defendant allowed an exception. It is understood that the instrument is to be copied into the record. It is attached hereto and made a part hereof.

Judge WINN.—We now offer in evidence a mortgage which is found in book 6 of the records, at page 485, which is a mortgage by the Taku Mining & Milling Co. to Samuel Coulter, dated August 20, 1889,

(Testimony of Grover C. Winn.)

and recorded in this book I have just mentioned, commencing at page 45 and including several pages. I will state that there was a mortgage recorded on this property and it was afterwards foreclosed and we have the marshal's deed.

Mr. SHACKLEFORD.—We object to the instrument for the reason that there is no evidence of the legal capacity of the Taku Mining & Milling Co. either to hold or give title.

Objection overruled and exception allowed defendant. The instrument is attached hereto and made a part hereof.

Q. Is this book 9 of Mortgages or Deeds?

A. 9 of Deeds and Mortgages.

Q. Is that one of the books or records of your office? A. It is.

Mr. WINN.—This mortgage was given by the Taku Mining & Milling Co. to Samuel Coulter and wife, and there is an assignment of the mortgage here by Coulter to Willis Thorp—we are offering in evidence the assignment, commencing at page 681 [123] and including 682.

Mr. SHACKLEFORD.—We object to the assignment on the ground that the mortgagor had no capacity. There is no evidence that the mortgagor had any capacity to hold title to property in the District of Alaska.

Objection overruled and defendant allowed an exception. The instrument is attached hereto and made a part hereof.

Q. This book of records #10 which we have here,

(Testimony of Grover C. Winn.)

I will ask you if that is one of the books of the records of your office. A. It is.

Judge WINN.—We now offer in evidence the marshal's deed from Lewis L. Williams, U. S. Marshal for the District of Alaska, to Willis Thorp, dated the 16th day of November, 1895, and found on pages 786, 787, 788 and 789 of this book. I suppose the marshal's certificate should be merged into this and should contain a full recital of all the foreclosure proceedings.

Mr. SHACKLEFORD.—We object to it as incompetent, irrelevant and immaterial, no proper foundation having been laid for its introduction, and on the further ground that there is no proof of the legal capacity of the predecessor in interest the Taku Mining & Milling Co. to hold real estate in the District of Alaska.

Judge WINN.—To save any question about that, we will offer in evidence, and wish to have the stenographer copy, the complaint, etc., in the suit for foreclosure of mortgage being Case #393 of this court and the judgment and decree of foreclosure—we will change that. We offer in evidence in Case 393, in this court, the judgment and decree of foreclosure and order of sale made on June 7, 1895, *wherein* [124] *was* the purchaser of the property in question * * * and we will also offer in connection with this judgment the complaint of foreclosure in the case.

Mr. SHACKLEFORD.—We object to the judgment and decree as incompetent, irrelevant and im-

(Testimony of Grover C. Winn.)

material; no proper foundation having been laid for its introduction.

By the COURT.—Do you care to prove your service? Do you think the decree proves the service?

Judge WINN.—It recites service and it also appears that the party appeared and demurred and the demurrer was overruled and denied.

Objection overruled. Defendant allowed an exception.

The above papers are attached hereto (copies) and made a part hereof.

The originals are marked temporarily Plaintiff's Exhibit "D," to be returned to the clerk's files when copied.

Judge WINN.—Exhibit "D" covers the judgment and decree. We will now offer the amended and supplemental complaint in the same cause.

Same objection—same ruling. Defendant allowed an exception.

It is marked Plaintiff's Exhibit "E," to be withdrawn and copy attached hereto.

Judge WINN.—We now offer in evidence the order of sale which said order is stamped, Done in open court at Juneau, Alaska, this 7th day of June, 1895, Warren Truett, Judge of the District Court for the District of Alaska, and was filed on July 15, 1895. I think our statute makes the order confirming a sale proof of regularity in all proceedings pertaining to it.

Mr. SHACKLEFORD.—We object to the order of sale as being incompetent, [125] irrelevant and immaterial and no proper foundation having been

(Testimony of Grover C. Winn.)

laid, and on the further ground that there appears to be no reservation of jurisdiction in the decree of June 7th, and the order appears to have been filed July 15, 1895, after the Court lost jurisdiction unless reserved in the decree.

Objection overruled. Defendant allowed an exception.

It is marked Plaintiff's Exhibit "F," with understanding to be withdrawn when copied and attached hereto.

Judge WINN.—We now offer in evidence order confirming sale in the case of Willis Thorp, Pltff. vs. Taku Mining & Milling Co. et al., Case #393, of this court, which is dated on the 12th day of September, 1895, and signed by Warren Truett, Judge of the U. S. District Court for the District of Alaska.

Mr. SHACKLEFORD.—We object to it as incompetent, irrelevant and immaterial and no proper foundation having been laid for its introduction, and on the further ground that it is apparently based on a sale made under the order of sale filed July 15, 1895, objection to which has already been made.

Objection overruled. Defendant allowed an exception.

Order is marked Plaintiff's Exhibit "G," to be withdrawn and copy substituted and attached hereto.

Judge WINN.—We now offer in evidence the marshal's deed, which is found in the book which we have just identified, the book of records #10, and found at pages 786, 787, 788 and 789 and dated on November 18, 1895.

(Testimony of Grover C. Winn.)

Mr. SHACKLEFORD.—We object to it as incompetent, irrelevant and immaterial and no proper foundation having been laid to show jurisdiction or authority for the sale. [126]

Objection overruled. Defendant allowed an exception.

(Copy of the deed is to be attached hereto and made a part hereof.)

Judge WINN.—We now offer in evidence an instrument in writing purporting to be a deed dated November 18, 1895, from Willis Thorp and Sarah Thorp, husband and wife, of the town of Juneau, to William M. Ebner, which deed is found in the book 10 at pages 790 and 791 of the record, which deed purports to convey the property in question to Wm. M. Ebner.

Mr. SHACKLEFORD.—We object to it as incompetent, irrelevant and immaterial and carrying title to a corporation, the Taku Mining & Milling Co., concerning which there is no proof as to its authority to take or hold property in the District of Alaska.

Objection overruled. Defendant allowed an exception.

(Deed to be copied into the record.)

Judge WINN.—We now offer in evidence an instrument in writing which purports to be a deed dated the 18th day of November, 1895, from Wm. Ebner and his wife to Charles W. Young of Juneau, Alaska, and purports to convey to Young a 1/16 interest in and to this property; it is found in the book

(Testimony of Grover C. Winn.)

of records #10 of this recording district, at pages 795 and 796.

Mr. SHACKLEFORD.—We object to it as incompetent, irrelevant and immaterial. Objection overruled and defendant allowed an exception.

(The deed is ordered copied into the record—it is attached hereto and made a part hereof.)

Judge WINN.—We now offer in evidence a deed bearing date the 8th day of November, 1895, from Wm. M. Ebner and his wife to B. M. Behrends purporting to convey a 1/8 interest in and to this property we have been speaking of, all the mining [127] claims, and found in book 10 at pages 797 and 798.

Same objection. Objection overruled. Defendant allowed an exception.

(Same order as to copying the deed into the record.)

Q. We have a book here called Records 11 of deeds. I will ask you if that is a book of record of your office? A. It is.

Judge WINN.—We now offer in evidence a deed found at page 54 of this book just mentioned to the witness, dated the 9th day of December, 1895, by and between Wm. M. Ebner and wife of Juneau, Alaska, parties of the first part, and the Ebner Golding Mining Co., a corporation, the party of the second part.

Mr. HELLENTHAL.—We object to that for the reason that the Ebner Gold Mining Co. purports to be incorporated under the laws of the District of Alaska, at a time when it could not be incorporated and hence could have no legal existence and no capac-

(Testimony of Grover C. Winn.)

ity to hold or take property.

Objection overruled. Defendant allowed an exception.

(Same order as to copying the deed into the record.)

Judge WINN.—In this same book, commencing at page 57, we offer a paper purporting to be a deed dated April, 1895, from Chas. W. Young to the Ebner Gold Mining Co., purporting to be a deed to the property in question.

Same objection. Overruled. Defendant allowed an exception.

(Same order as to copying the deed into the record.)

Judge WINN.—In this same book, commencing at page 60, we offer an instrument bearing date the 9th day of December, 1895, wherein B. M. Behrends and his wife purport to convey all their interest in and to the property in question to [128] the Ebner Gold Mining Co.

Same objection. Objection overruled. Defendant allowed an exception.

Judge WINN.—We offer in evidence the Articles of Incorporation of the Ebner Gold Mining Co., which is found in this book which we have just identified by Grover Winn, the book of records #11, at pages 25 and 26 of these records.

Mr. HELLENTHAL.—We object to this offer—in the first place because the purported incorporation was attempted to be incorporated under the laws of Alaska at a time when there were no laws in

(Testimony of Grover C. Winn.)

Alaska authorizing the incorporation of the company and the corporation so attempting to be incorporated could have no legal existence, either *de facto* or *de jure*; for the further reason that there is no law, and never has been a law, authorizing the filing or recording of articles of incorporation with the United States Commissioner, and the United States Commissioner had no authority under the statute to record such articles and the same is incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

(Same order as to attaching the instrument and making the copy a part of this record.)

Q. I will ask you if this book which I present to you, which is called Book 15 of Lodes, is one of the records of your office. A. It is.

Judge WINN.—We now offer in evidence, subject to the further testimony of Mr. Ebner, the location notice of Parish #2 lode mining claim, commencing at page 157 and continuing on pages 158 and 9 and signed Wm. M. Ebner. We will question Mr. Ebner later concerning the making of the notice and [129] posting it. I will identify it at this time and offer it in evidence later on.

By the COURT.—You simply identify it by offering it by the page of the record?

Judge WINN.—Yes, sir.

Mr. SHACKLEFORD.—We now give notice to counsel on the other side that we demand the production of the original location notice of Parish #2.

(Testimony of Grover C. Winn.)

Judge WINN.—If we have it, we will bring it to you. We desire also at this time to identify the deed from Ebner for the Parish #2 lode mining claim to the Ebner Gold Mining Co.

Q. I will ask you if this book of deeds #20 is also one of the books of record of your office.

A. It is.

Judge WINN.—We now offer in evidence deed commencing on page 10 of this book #20 of Wm. M. Ebner. This covers some other property. We offer it in evidence for the purpose of showing the conveyance of the Parish #2, the deed, so far as the other property is concerned, is immaterial but we identify it at this time. I offer the whole of it, for the sole purpose of showing the conveyance of the Parish #2 to the Ebner Gold Mng. Co.

Mr. HELLENTHAL.—We object to it for the reason that the Ebner Gold Mining Co. has not been shown qualified to take and hold property; on the contrary, the evidence so far offered shows that the Ebner Gold Mng. Co. was a corporation attempted to be incorporated at the time that there was no law authorizing the incorporation in this district and therefore had no capacity to take or hold property.
[130]

By the COURT.—It will be admitted with the understanding that unless the existence of the Parish #2 is shown by sufficient location, it will be stricken out later. The other ground of the objection is overruled.

To which ruling of the Court counsel for de-

fendant then and there duly excepted. Exception allowed.

Witness excused.

**[Testimony of William M. Ebner, for Plaintiff
(Recalled).]**

WILLIAM M. EBNER—Continuation of direct examination.

(By Judge WINN.)

Q. How many years' residence did you state that you had had in Alaska prior to leaving here to go to California?

A. About twenty years; something like that.

Q. I have forgotten whether I asked you what business you followed during that period of time in Alaska or not. A. Yes.

Q. What was it? A. Mining.

Q. I have offered in evidence in this case Articles of Incorporation of the Ebner Gold Mining Company, which is marked Plaintiff's Exhibit "A." There seems to be a William M. Ebner who signed those articles. Are you the William M. Ebner that is mentioned in there? A. Yes, sir.

Q. I have also offered in evidence in this case Plaintiff's Exhibit "B," which is a series of mining claims commencing with the Lotta on the southerly end of the map and then extending through a series of mining claims. I will ask you to look at this map and plat, look at the names of the mining claims of there, and ask you if you are familiar with [131] that property? A. Yes, sir, I am.

(Testimony of William M. Ebner.)

Q. When, Mr. Ebner, did you first become acquainted with this mining property?

A. I first became acquainted with this mining property in 1891.

Q. 1891? Yes, sir.

Q. Was that before the Ebner Gold Mining Company became the owner of it? A. Yes, sir.

Q. Did you have anything to do with the running, mining or operating of this property prior to the time that the Ebner Gold Mining Co. became the owner of it? A. Yes, sir.

Q. How many years were you in any wise connected with this property before the Ebner Gold Mining Co. became the owner of it?

A. Why, about one year before, or one season before they came in possession of it.

Q. And that was in 1894; that is, the conveyance was made in 1895 to the Ebner Gold Mining Company? A. Yes, sir.

Q. What connection did you have with that property in 1894?

A. I leased the property and operated the mill, crushed some ore that I mined on the other side of the creek, from another property.

Q. What improvements, leaving out those late improvements that have been placed on the property within the last year, what improvements were there on this property when you first became acquainted with it and at the time you leased it and operated it?

[132]

A. There was a ten-stamp mill, a rock-crusher,

(Testimony of William M. Ebner.)

four Frue vanners, water-wheels and a tramway, cars, blacksmith-shop, etc.

Q. Do I understand you to say that you leased this mill and the milling property to mine this particular property that was afterwards the Ebner Gold Mining Company in 1895, or did you mine some other property that year that you leased it?

A. I leased the property, the entire property, in the winter-time or late in the fall, and during the fall of 1894 I crushed some rock from another property, and during the summer of 1895 I operated under a lease what was afterwards, what is now, the Ebner mine; or, in other words, these properties that are shown on this map.

Q. Did you continue for any length of time after the year 1895 to operate this property as a mining property?

A. Yes, sir, we continued to operate this as mining property until the spring of 1907.

Q. 1907? A. Yes, sir.

Q. Did you increase the capacity of the mill by adding any stamps, or did you make any other improvements while you were running this property for the Ebner Gold Mining Company other than was on there when the Ebner Gold Mining Co. became the owner?

A. Yes, sir, we added five stamps and we started a new mill, or, in other words, a compressor—we installed a compressor and we made a great many other improvements in the way of developing the property in the way of buildings; we built a new black-

(Testimony of William M. Ebner.)

smith-shop and several other buildings, such as assay buildings, etc., and we drove a great many tunnels; in fact, we drove most all the tunnels with the exception [133] of one or two that were driven there. All the long tunnels, the developed tunnels, were all driven by the Ebner Gold Mining Company.

Q. Can you state to the Court which one of those mining claims that is delineated on this exhibit "B" that the mill you have just spoken of is located and which one the air-compressor is located on?

A. Yes, sir; the air-compressor is located on the Lotta and the mill is located on the Taku Gold & Silver.

Q. Is either the mill or the air-compressor indicated on this map or plat, Exhibit "B," which you have in your hand?

A. The old mill is indicated on this.

Q. The air-compressor, as I understand it, was built afterwards, after the survey was made.

A. Yes, the air-compressor—it was built a long time after.

Q. You have given the Court the name of the claims the air-compressor is on? A. Yes, sir.

Q. That is the same mill that is up there now?

A. Yes, sir; that is the same mill that is up there now, it contains the stamps.

Q. And is that the same mill that was there before the Ebner Gold Mining Co. became the owner of it?

A. Yes, sir; the same mill.

Q. Except you increased its capacity?

A. Yes, sir, five stamps.

(Testimony of William M. Ebner.)

Q. It is a fifteen-stamp mill? A. Yes, sir.

Q. What water did you use in generating the power, running the mill, for milling the ore, and the compressor, etc., over [134] this period of time that you have just testified concerning?

A. We used the water from Gold Creek, taking it at the Ebner dam, about 1100 feet from the mill,—no, I think about a thousand feet from the mill.

By the COURT.—The mill you are talking about now, is that the one on the creek in the bottom of the gulch?

A. No; that is the old mill with the long wheel-house coming down from above the falls.

Q. About what period of time of each year, that is, how many months out of each year covering the period of time you have stated, from 1895 down to 1907, did you operate the mill and run the mines and develop them, etc., what period of time was your active work going on in this respect?

A. During the years of 1896 and 1897 we operated from early spring until late in the fall; commencing with 1898, I think from that time on, we pretended and did operate almost the entire year, with probably very short shut-downs.

Q. Did you do any development work outside of taking ore, extracting from the mines the necessary ore to mill?

A. Did we do any development work in the mine?

Q. Yes. A. Yes.

Q. Briefly, what did that consist of during those years?

(Testimony of William M. Ebner.)

A. The first years we drove what we call our second level; we started a cross-cut in the winter of 1895 and 1896 after the Ebner Gold Mining Company was incorporated, that is, on the upper level; that is driven in 176 feet, and the stopes and tunnels on the ledge, I think they aggregate between five and six hundred feet,—I wouldn't be positive exactly,—and two hundred feet lower down on the lower level, [135] coming into the top, on a level with the top of the old mill, that tunnel is in, I think, something like between five and six hundred feet, with connections through to the upper level.

Mr. SHACKLEFORD.—We move to strike the reference of the witness in the last answer to the incorporation of the Ebner Company as incompetent.

Motion denied. Defendant allowed an exception.

Q. From 1895 down to 1907, in what capacity were you serving this company and in what capacity were you running these properties and milling the ores?

A. I was the president of the company.

Mr. SHACKLEFORD.—Same objection as before, and we move to strike the answer of the witness as not the best evidence.

Objection overruled and motion denied; defendant allowed an exception.

The WITNESS.—(Continuing.) And I had charge of the works as manager.

Q. I will ask you if over this period of time you became acquainted with the monuments, the boundary lines, stakes, etc., of pretty much all this

(Testimony of William M. Ebner.)

patented property which is indicated on Plaintiff's Exhibit "B," which you hold in your hand?

A. Yes, sir, I did. I found them all and knew where they all were with the exception of a few—some were down in the creek that had gone out, and some that were on the hillside had gone away, but the majority of the monuments I found and was familiar with and am familiar with now,—in other words, I can go there and find them and know just where they are. [136]

Q. Now, I will ask you, Mr. Ebner, when you became familiar if at all, with the boundary lines, monuments, etc., upon the ground of what is known as the Lotta patented claim.

A. I became familiar with the boundary lines and some of the monuments of the Lotta in 1892.

Q. What particular corner posts or monuments of the Lotta claim in 1892 did you become acquainted with?

A. The northwest corner and the southwest corner.

Q. I will ask you, Mr. Ebner, that you mark those corners by the small letters "a" and "b" on this plat.

Mr. SHACKLEFORD.—They are numbered on the plat anyway.

The WITNESS.—This is the northwest corner (indicating) and this is the southwest corner (indicating). These two corners are numbered by posts. I think they are corner post #6 and corner post #5 as marked on this plat.

(Testimony of William M. Ebner.)

By The COURT.—P. No. 6 and P. No. 5?

A. Yes, sir.

Q. I have identified by Grover Winn, the Recorder and Commissioner of this Recording District, in Book 15 of the records, and also identified commencing with page 157 and continuing on pages 157 and 159, the location notice—I will let you take that book and look at this notice, and ask you if you know anything about that notice or one like it.

Mr. SHACKLEFORD.—Before you go into that I will ask, while your witness is on the stand, if he or you are able to comply with our demands for the production of the original notice.

Judge WINN.—I am going to ask him that in a moment.

Q. Do you know what became of the original notice, Mr. Ebner,—have you it in your possession?

A. I do not. [137]

Q. At whose instance was this instrument recorded. A. At mine.

Q. Do you know anything about a claim called the Parish No. 2 lode mining claim, Mr. Ebner?

A. Yes, sir.

Q. I will ask you if you had anything to do with the locating, staking out and marking the boundaries of the Parish #2 on the ground,—have anything to do with it individually, yourself?

A. Yes, sir.

Q. Now, this notice which is included in this book which you have just examined at pages 157, 158 and 159,—I will ask you if you ever posted any sort of

(Testimony of William M. Ebner.)

a notice of this kind upon the Parish No. 2 lode mining claim?

Mr. SHACKLEFORD.—We object to that as incompetent, irrelevant and immaterial, no proper foundation having been laid.

Objection overruled. Exception allowed defendant.

A. Yes, I did.

Q. Now, I will ask you, Mr. Ebner, how the notice which you posted upon the ground compared with the notice which has been shown you in this book, No. 15 of the records?

Mr. SHACKLEFORD.—We object to that as incompetent, irrelevant and immaterial, no proper proof having been made of the loss of the original notice.

By the COURT.—When did you last see the original notice?

A. Several years afterwards; the notice was put in a tin can and the tin can was tied to the stake,—I think about a year and a half afterwards, the last time I saw it; that was just before the snow-slide came down in there.

Q. It was posted on the claim?

A. Yes, sir. [138]

Judge WINN.—I will state to the Court that the statute also makes certified copies permissible in evidence in the absence of the original.

Objection overruled. Defendant allowed an exception.

Judge WINN.—We offer in evidence this location

(Testimony of William M. Ebner.)

notice found on pages 157, 158 and 159 of book 15 of Lodes.

Mr. SHACKLEFORD.—We object on the ground that no proper foundation has been laid for its introduction, and it is incompetent, irrelevant and immaterial, and no proper explanation has been given for the loss of the original notice posted on the ground, and for the failure to comply with the demands to produce the original notice recorded.

Q. (By the COURT.) Have you looked for the original notice recorded?

A. We have since I came here.

Mr. SHACKLEFORD.—And for the further reason that it appears from the said notice that it does not comply with the mining laws of the United States with reference to the location of lode mining claims, in that it fails to tie the location to any permanent or natural object by reference so as to identify the position of the claim.

(By the COURT.)

Q. Have you searched among your papers for the original of the recorded notice?

A. I did last fall, yes, sir, and I am inclined to think that it was lost in the office of Hill & Wetrick—that is where we had it last.

Q. You have been unable to find it?

A. Yes, sir, I have been unable to find it.

Q. Found no trace of it? A. No. [139]

Q. Have you searched among their papers?

A. I searched among my papers.

(Testimony of William M. Ebner.)

Q. You have searched among the papers you had there?

A. I asked them last fall and they looked for it.

Objection overruled. Defendant allowed an exception.

Mr. WINN.—I will read it into the record. I will furnish a certified copy.

(Certified copy is attached hereto and made a part hereof.)

Q. Now, Mr. Ebner, I will ask you what you did, if anything, with reference to staking out and marking the discovery of this particular claim as described in this location notice just read—I will withdraw that question. What did you do with regard to staking out and marking the boundaries upon the ground of this lode claim which is described in this notice?

Mr. SHACKLEFORD.—We object as incompetent, irrelevant and immaterial, no proper foundation having been laid.

Overruled. Defendant allowed an exception.

A. Why, when I got ready to stake I took several men from the crew that I had working in the Ebner mine and went out and brushed out from the Lotta stake in a southerly direction.

Q. Take that map or plat marked exhibit “B” and tell the Court just where you brushed out with reference to the Lotta lode claim. Describe on that exhibit what line you brushed out, giving the names of the corners, if you will.

(Testimony of William M. Ebner.)

A. I came here and we brushed along this line (indicating).

Q. What line is that?

A. That is the southwest side line of the Lotta lode claim; we brushed out—this is north, that would be the southwest—it is the southwest side line of the Lotta lode claim.

By the COURT.—That would be the southeast corner? [140]

A. The southwest corner of the Lotta—this is the southeast—that is north and that is south as near as can get it.

Q. What corners are they,—how are they numbered? Call out the number you started from.

A. I started at Post Number 5 of the Lotta lode claim and brushed in a northwesterly direction along the side line of the Lotta lode claim; came over here and found this stake, Post #6, and set up a flag there, and we brushed along that line down very near the creek there and then got a sight through that and came out here along what is called the Royal lode claim, one hundred and twenty-five feet, measuring with a tape-line, and then with a pocket compass made a square turn, came over here six hundred feet; in the first place, we made a sort of preliminary survey and got it in here, because I wanted to get the distance from the croppings; this location notice here is set on quartz croppings actually in place, and after we made this preliminary survey and surveyed in here, we got the distance of

(Testimony of William M. Ebner.)

about what it would be in here. We came around here and brushed up around this claim.

Q. Around the Parish Number 2?

A. Around the Parish #2; and as we came along that set of posts here, one hundred and twenty-five feet in a southerly direction, we came here, and we had this post set here, the location post, and then we passed on and set the southwest corner of the Parish—came over here and set this post approximately—this runs up to some other property.

Q. What post would that be?

A. That would be the northwest corner of Parish #2.

(By the COURT.)

Q. What do you call this point here? [141]

A. That is the northwest corner.

Q. What is that corner, then?

A. That is the northeast.

Q. What is that? A. Southeast.

Judge WINN.—If you will call them by the numbers it will be better.

The WITNESS.—What I call the northwest corner is Post #6, and what I call the southwest corner is Post #5.

Q. What, if any, stakes did you set on the Parish #2 and what kind of stakes?

A. We set big alders and set alder stakes.

Q. About what size?

A. Some of them were three inches in diameter.

Q. Was there any portion, any of the side lines of the Parish #2, made a common side line of the

(Testimony of William M. Ebner.)

Lotta? A. Yes, sir.

Mr. SHACKLEFORD.—We object, for the reason that it calls for a conclusion of the witness. At the time the location of the Parish #2 was made, as I understand it, the Lotta had gone to patent, and we want to have the record show distinctly that we make objection to any reference of the witness to the identity of any of the lines with the patented claim, except as he may refer to the old stakes.

Objection overruled. Defendant allowed an exception.

Q. How is that, Mr. Ebner?

A. I don't exactly remember that question.

Q. I asked you if any portion or any one of the side lines of the Parish #2 as staked out and brushed out by you had anything to do with or was in common with any part of any one of the side lines of the Lotta claim? [142] A. Yes, sir.

Q. What portion and what side lines?

Mr SHACKLEFORD.—Same objection. Objection overruled and defendant allowed an exception.

A. All of the side lines; with the exception of the 125 feet, we aimed to keep the two lines, the Lotta side line and the Parish #2, identical, because we wanted to join them together and that is what we had to go by; we wanted to identify them by that line, and then we came up on the Royal; we found the Royal stake which we knew was a patented claim.

Judge WINN.—I want to withdraw the witness for a moment while I call Mr. Pond.

By the COURT.—Very well. [143]

[Testimony of Percy Pond, for Plaintiff.]

PERCY POND, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Judge WINN.)

Q. I will hand you a photograph and ask you if you know anything about that and who took it.

A. I made the negative from which that photograph was made last November.

Judge WINN.—I suppose you will admit that Mr. Pond is a photographer?

Mr. HELLENTHAL.—Yes, sir.

Q. Who took you upon the ground that is shown in that photograph and showed to you what they desired you to photograph? A. Mr. Wettrick.

Q. Now, that photograph was taken up on Gold Creek on the piece of property up there that Mr. Wettrick took you upon to have you take the photograph, was it? A. It was.

Q. I will ask you if that is a just representation of the landscape and the objects that are contained in there? A. It is.

Q. Is there anything else besides that white stake there that was pointed out to you which was desired to be taken in that photograph?

A. There is a building here which is designated by a white mark—a handkerchief was pasted on the face of the building.

Q. What kind of ink shows best on that photo-

(Testimony of Percy Pond.)

graph so you can mark more plainly where that building is?

A. There is another photograph showing the building there—the same stake.

Q. I wish you would mark the date on the back of that when you took it. [144]

A. It is marked in the front 11/22/10—that signifies the 22d day of November, 1910.

Q. You know nothing particularly what those stakes were—that corner posts or stakes—all you know is you just went there and took the photograph as indicated by Mr. Wettrick? A. Yes, sir.

The photograph is marked for Identification Plaintiff's Exhibit "H."

Q. I show you another photograph and ask if that was taken by you. A. It was.

Q. The same date the other was taken?

A. The same date.

Q. Is there anything particular in that photograph that your attention was called to, that Mr. Wettrick desired to have included in the photograph, besides the big white post there?

A. There is a building in the distance on a line with the stake—the building is up in the brush.

Q. I wish you would mark that by the letter "a." (Witness does so.)

The photograph is marked for Identification Plaintiff's Exhibit "I."

Q. I have another one that shows some objects upon it. I will ask you what besides the white post

(Testimony of Percy Pond.)

there was your attention called to, to include in that photograph.

A. The same building shows in the distance and the side line close to the building.

Q. Is that a photograph of the same post that these other two identified exhibits contain?

A. No, sir. [145]

Q. It is not the same post? A. No, sir.

Q. Where is that post with reference to any other natural object on the ground up there—can you particularly describe it?

A. It is on the basin road, about midway between Cape Horn and the Ebner mill.

Q. Going up the creek, it is on what side of Gold Creek? A. On the left-hand side going up.

Q. On the left-hand side going up the creek and pretty nearly opposite—what did you say the Ebner mill or the air-compressor?

A. Well, you can see the steps leading down to the air-compressor in the picture.

Q. These other photographs you took of a post which you have just identified—where was that post with respect to Gold Creek going up?

A. It was close by Snowslide Gulch.

Q. On the right or left side going up?

A. On the right-hand side.

Q. On the opposite side that the photograph you have in your hand shows the post to be in?

A. Yes, sir.

Q. Was your attention called to any object between those two posts that it was desired be em-

(Testimony of Percy Pond.)

braced in that photograph? A. No.

Q. Where is the brush? Was there a brush outlined there?

A. You can see the brush outline leading close to the building which shows in the other photograph.

Q. The brush outline you have reference to was over on the [146] right-hand side of the creek—you went up near that little old building?

A. Yes, running toward Snowslide Gulch.

Q. On the right-hand side of the creek as you go up, near that little old building where the post appears in these other photographs? A. Yes, sir.

The photograph is marked for Identification Plaintiff's Exhibit "J."

Q. Here is another photograph which seems to have been taken very close up to the objects they desired represented there—did you take that photograph also? A. I did.

Q. Where was that post that you photographed in that picture with reference to the other post that you have just described in the other photographs, or is it one of those same posts?

A. It is higher up on the hill above the new flume that they were building.

Q. On the left-hand side of the creek as you go up? A. Yes, sir.

Q. And what is that post numbered there?

A. It seems to be 6—S. 87.

Q. It is a matter of reading, I suppose?

A. Yes.

(Testimony of Percy Pond.)

It is marked for Identification Plaintiff's Exhibit "K."

Q. Now, I have one more—was there any other object called to your attention to be included in that beside the post?

A. There is a post in the foreground and about between 100 and 150 feet or so is this same post that is close to the building and is shown on the first two photographs I identified. [147]

Q. In other words, it exhibits a post about 100 feet or so from the post near the buildings in the other photographs?

A. The one in the foreground; yes.

Q. Is there any other object in there that you see that your attention was called to to include in that photograph that you identify at this time?

A. No.

The photograph is marked for identification Plaintiff's Exhibit "L."

Witness excused.

[Testimony of F. J. Wettrick, for Plaintiff.]

F. J. WETTRICK, called and sworn as a witness in behalf of the plaintiff, testified as follows: (By Judge WINN.)

Q. You heard the testimony of Mr. Pond about you taking him up there to have some photographs made. I hand you this one that has been identified as "H" and ask you, without reference to the surveys, where that post is and what objects you desired Mr. Pond to include in that photograph. Identify them with reference to something like a

(Testimony of F. J. Wettrick.)

building or some road or something of that kind and I will question you later as to what corner posts you think they are.

A. That is a post that is found near a certain cabin alongside a road known as the Coulter road, and in having that photograph taken I desired Mr. Pond to include in that the line that was brushed out up over the hill and to show as many stakes as could be shown in that line and also show [148] the line running over toward the main road, the road leading up to the mine.

Q. Then that post is on the right-hand side of the creek as you go up the creek?

A. It is on the right-hand side of the creek.

Q. And approximately what distance from the creek, just approximately now. I will ask you to give the exact distance later on.

A. Approximately 600 feet.

Q. You desired to show, then, from that post near the cabin something that is brushed out across the creek and some other object on the left-hand side of the creek?

A. Yes, sir, to show the line that was brushed out leading toward the creek and crossing the creek and leading up toward the road where is found another stake which this picture does not show.

Q. Here is another one marked "I." What particular objects did you have that taken so as to include there?

A. I wanted that particularly to show the stake, the post shown in the ground there, with reference

(Testimony of F. J. Wettrick.)

to that same certain cabin referred to in the other picture.

Q. Can you see the cabin or where it is represented by some other object?

A. The cabin is designated here as "a" and shows plainly enough.

Q. Here is "J." What is that picture—what is in it that you desired to have Mr. Pond photograph?

A. I wanted him to show the exposed corner stake—the stake shows here on the picture with the markings on it and looking across Gold Creek to show the line as brushed out over [149] the hill there and the cabin on the other side.

Q. What side of the creek is that post there?

A. That is on the left-hand side going up—that is the way you refer to them, I think.

Q. And the line you call brushed out is on the opposite side of the creek in the direction from that post to the old cabin?

A. Yes, sir; and the old cabin also shows on this picture about some sixty feet from the line which is brushed out.

Q. Exhibit "K"—what did you desire embraced in that? What did you have Mr. Pond photograph there?

A. I had Mr. Pond particularly to try to get the stake that is shown here on the picture, with the marking upon it, and show as much of the new flume and the structure of the flume and mine as possible—the idea here was to show the stake as it was found on the ground.

(Testimony of F. J. Wettrick.)

Q. Just photograph it as it was on the ground?

A. Yes, sir.

Q. And there was no other particular object for that picture to be taken? A. No.

Q. Here is one marked "L." What particular ground or what particular object did you desire photographed in that?

A. I wanted to show in this photograph the stake which is shown there as the first one; wanted to get the cabin in there as well, but I don't think it shows very plainly here in the brush. The thing was to show this stake as shown here and the line as brushed out across the creek over toward the road and show the flag-pole on the other side of the road by the stake, as is shown in one of your other exhibits. [150]

Q. That post is on which side of the creek as you go up?

A. This first one is on the right-hand side going up the creek, referred to as the Coulter road.

Q. That is not the same as the regular traveled basin road?

A. No; that is an old road on the right-hand side of the creek.

Q. In what relation is that road with reference to the air-compressor, as it stands up there now—is it over across the creek from the air-compressor?

A. Yes.

Q. Does it extend that far up the creek?

A. It extends from the mine or mill, the old Ebner mill, down over the ground to the neighborhood

(Testimony of F. J. Wettrick.)

of that post on the Parish claim. I referred to the road because that is the natural object.

(By Mr. HELLENTHAL.)

Q. One of these pictures shows stake #6, that is the one near the flume—as shown in that picture.

A. I believe a marking on a certain stake there is 6 S.87, that is on the left-hand side of the creek going up, above the new flume a short distance.

Q. Above the new flume? A. Yes, sir.

Q. And some distance above where the other stake is standing that has also been photographed on that side of the creek?

A. The post by the road you refer to?

Q. Yes. A. Yes.

Q. Some distance up the creek from there, a little ways up the creek?

A. No; I don't get your idea there.

Q. The post that you have photographed here, situated right [151] near to the basin road—there is one post there? A. Yes, sir.

Q. This other stake is a little ways up above the flume? A. Yes, sir.

Q. Is that not true? A. Yes, sir.

Q. A little up the creek? A. Above the flume.

Q. When were these taken—they were all taken the same time, were they not?

A. Yes, sir, the date is on the picture. I don't remember the date; you will find it on the photograph.

Q. The dates are on the photographs?

(Testimony of F. J. Wettrick.)

A. Yes, sir.

Q. I wish you would look over these dates on the pictures to see that they are the correct dates on which they were taken.

A. Two of those were taken on the 22d day of November, according to Mr. Pond's notation, and two on the 24th.

Q. Last year? A. Yes, sir.

Q. They were all taken in the month of November, last year? A. Yes, sir.

Q. Independent of the notation, you know they were taken in November, last year?

A. As far as I remember, yes.

Q. I don't care about a day or two; that don't make any difference. A. Yes.

Q. This other one was also taken in November of last year? A. 11/22/10—the 22d day.

Witness excused. [152]

**[Testimony of William M. Ebner, for Plaintiff
(Recalled).]**

WM. M. EBNER—direct examination continued:
(By Judge WINN.)

Q. Now, going back to your examination, I think I had you tracing out the boundary lines of the Parish No. 2 lode claim. I will ask you to take this exhibit here, Plaintiff's Exhibit "D," and ask you if any of these corner posts and stakes that you set for the Parish #2 were on any of the side lines, or any of the lines of the Lotta claim as indicated on this exhibit?

Mr. SHACKLEFORD.—Objected to as incompe-

(Testimony of William M. Ebner.)

tent, irrelevant and immaterial, and not a competent question, for the further reason that the witness has no right to identify the markings on the ground with the exhibit that has not yet been applied to the ground; we object to the witness making any statement with reference to the position of the side line in connection with the position of the actual patented lines of the claim.

Objection overruled. Defendant allowed an exception.

A. Yes, sir; the northeast corner of the Parish #2 was set as near as we could get it on the side line of the Lotta claim.

Q. About how far from any one of the corners of the Lotta claim?

A. About 125 or 150 feet from the northwest corner of Post #6, as given on this plat.

Q. Did you brush out any from that corner in any direction? A. Yes, sir.

Q. In what direction with reference to this lower side line of the Lotta claim?

Same objection. Objection overruled. Defendant allowed an exception. [153]

A. We brushed out first in a northwesterly direction, followed the line and brushed it out; then we had to cross the creek there—I had a telephone there—and measured it off with a tape-line as 600 feet, and we stretched that across. We had to get up and down with a hundred feet tape-line and that is the way we located this corner here, and when we got 1500 feet from the post, 125 feet south of the post

(Testimony of William M. Ebner.)

#5 of the Lotta, why we set this stake here.

Q. (By Mr. SHACKLEFORD.) What corner is that?

A. That is the northeast corner of the Parish #2.

Q. I understand, then, that you set one stake about 125 feet—

A. About 150 feet, something like that, I don't know exactly, on this side line, as near as we knew, because this side line was brushed out across the creek here and brushed out partially up the hill.

Q. What direction did you go from that post to make the upper side line of the Lotta claim?

A. This one?

Q. The upper side line—that is, going up the creek?

A. Yes, sir; if I remember right we came out here across 600 feet, set this post here.

Q. As I understand it, you followed along the lower side line of the Lotta claim right in a straight line, far enough out to make the upper side line of the Parish # 2 claim fifteen hundred feet.

A. Yes, sir.

Q. And put a post at that corner? A. Yes, sir.

Q. And how did you turn—at right angles from that? How did you run with your next line of the Lotta claim,—from the [154] projection of the lower side line of the Lotta claim? You said you set a post until you got out 1500 feet and then turned—in what direction did you turn, at right angles or at what angle did you turn with respect to that side line and run another distance?

(Testimony of William M. Ebner.)

A. If I give it as we actually staked it out, we came on here first 125 feet—

Q. In a straight line?

A. This line was brushed,—the line along the Royal lode was brushed. We came out here 125 feet and put a stake.

Q. You continued in the same direction as the projection of the lower side line of the Lotta claim?

A. Yes, sir.

Q. And when you got it there—

A. We turned at right angles.

Q. And how far did you run? A. 600 feet.

Q. And what did you do there, if anything?

A. Then, we turned at right angles and ran 1500 feet and then turned at right angles and ran 660 feet, and then came along here to see how near perfect this was because this turned, and it check out. We measured all the way along up here until we got back to the posts here—we measured clean around the claim, all around the claim.

Q. Did you make any corner posts at these different corners?

A. Yes, sir, at every corner we put a post.

Q. Then, as I understand it, you staked out a claim there that was 1500 feet long, intended to be, as near as you could measure it? A. Yes, sir. [155]

Q. And 600 feet wide? A. Yes, sir.

Q. And have the end and side lines parallel?

A. Yes, sir.

Q. What, if anything, in the way of precious

(Testimony of William M. Ebner.)

metals did you discover upon the area which you have just described within the side lines and end lines of the Parish #2 claim?

A. I discovered quartz in place carrying gold values, very near, within a few feet of where the location stake was set.

Q. Where did you set the location stake?

A. That stake, the location on the south, as I said, we went up 125 feet and then turned at right angles, went across, and at 300 feet we set the location stake and at the end of 600 feet we set the corner post, and this location stake came within a very short distance of the place where I had discovered quartz in place carrying gold, on the north side of what is called the Borean pit, the old placer pit mined years ago, and I discovered there rock in place carrying values where this crossed the creek.

Q. Where the old line—

A. Where the old line crossed the creek, about 4 or 500 feet from that, not exactly in the centre of the claim but along in there I found where it carried values.

Q. This was all, as I understand it, within the exterior boundary lines of the Parish #2?

A. Yes, sir.

Q. And near the centre of the claim?

A. Very near the centre of the claim—we discovered it very near the centre, within a few feet, probably.

Q. I will ask you if you had any of that quartz assayed? [156]

(Testimony of William M. Ebner.)

A. I did at the time; I did before I made any location, yes—I had it assayed when I discovered it.

Q. What values, do you remember, that you found?

A. I think that one next to the Borean pit I got two dollars and forty cents; down further in the creek I think I got \$1.50 or \$1.60.

Q. Now, you are pretty well acquainted with the general run of ores on that property all up and down the creek there—what is about the general value of the ores that is being mined up there?

A. From \$2.00 to \$3.50—from \$1.50 to \$3.50.

Q. How does that compare with the general run of milling ore that has been mined and milled up there?

A. That compares very favorably with what I have been running.

Q. On this same property? A. Yes, sir.

Q. Now, Mr. Ebner, you said some time ago, I believe, in your testimony, you stated as to what time you became acquainted with the ground that is referred to as the Lotta lode claim and said that you had seen some stakes up there for some length of time. I will ask you to state to the Court when it was that you first discovered any stakes along the line that you have been terming here on this map as the lower end line of the Lotta claim?

A. I saw stake #6 on the Lotta claim—it was pointed out to me and I saw that in 1892.

Q. In 1892?

A. Yes, sir, and stake #5 I first became acquainted with that the next or following spring, in 1893.

Q. I will ask you what you have done since you

(Testimony of William M. Ebner.)

first discovered [157] those stakes with reference to keeping them up and replacing them at times when the old ones became rotten and decayed.

(Objected to and question withdrawn.)

Q. You said in 1892 you saw a stake that was marked #6, or something. I will hand you this photograph which has been identified here as Plaintiff's Exhibit "K"—you have seen this photograph before? A. Yes, sir.

Q. And I will ask you if from the looks of that photograph and what is shown thereon and from the testimony of Mr. Wettrick and Mr. Pond—if you know where that stake is on the ground?

A. Yes, sir; this stake is what is marked Post #6 on the plat.

Q. Then, you stated awhile ago that you had become acquainted with Post #6 in 1892?

A. Yes, sir.

Q. I will ask you if the same post—if that post shown in the photograph is the same post that was there in 1892?

A. It looks just the same—just the same post.

Q. Have you seen that post right along?

A. Well, I saw it again in 1893 and I have seen it at different times; I have not seen it for a couple of years. I have not seen it for three years, I don't think, but I remember the post and the way it sets there and the markings on that, and the trees more particularly, the surroundings. I know the post looks just like the one I saw when I first saw it and the trees and surroundings near this exhibit—the

(Testimony of William M. Ebner.)

post seems to be dipped just a little bit more—it used to stand up straight.

Q. You haven't seen the post, you say, for about three years? [158]

A. No, probably longer than that.

Q. Now, about how frequently between 1892 and up to three years ago did you see that?

Mr. SHACKLEFORD.—We object to that as too general and indefinite.

Objection overruled. Defendant allowed an exception.

A. Why, the way I came to see this post, I was purchasing some property now called the Dora group—it used to be the Wyman group—and while I was negotiating I wanted to know where the end lines were and where they joined on, and a man that knew where these posts were, he went around and showed me these posts, and that is the way I know.

Mr. SHACKLEFORD.—We object to the witness testifying to any conversation or action by another person as hearsay and moved to strike the testimony.

Objection overruled and motion denied. Defendant allowed an exception.

Q. Do you remember what the man's name was?

A. A man named Mike Dunn.

Same objection and motion to strike. Objection overruled. Defendant excepts. Exception allowed.

Q. I will ask you if you talked about—if you had an object in finding the boundaries—this Dora property, does any of it abut or join on the Lotta claim or any of that property there? A. Yes, sir.

(Testimony of William M. Ebner.)

Q. The Dora group of claims you afterwards became interested in?

A. Yes; I became interested in the Dora long before I did in the Ebner group, and I looked up those boundaries, more particularly this corner and the north end lines as well as [159] the side lines of the Lotta, in order to ascertain where they claimed their locations and where the stakes were and what vacant ground there might be in there.

Q. That was in 1892, before you became interested in the Ebner property? A. Yes, sir.

Q. Where is that post with reference to any natural object—a road or anything that runs up there, the wagon-road?

A. If you go up the road or walk along the road until you are right in line with the creek and the high falls and then turn around and look up the hill, it is right square up the hill, a very steep hill, above the road on the left-hand side of the road in a little bunch of timber; you can see it plain from the road.

Q. On the left-hand side of the creek as you go up the creek?

A. On the left-hand side of the creek and on the left-hand side of the road.

Q. What direction with reference to the air-compressor or mill?

A. It would be northwest from the mill. It would be northwest from the air-compressor and almost directly west from the mill.

Q. (By the COURT.) Opposite the upper or high falls?

(Testimony of William M. Ebner.)

A. Yes, there is a stake on the road and taking that stake in line with the falls and squaring around, it is in line with that, but up the hill.

Mr. SHACKLEFORD.—The stake that you have just been testifying to is the stake marked on Exhibit “K” for identification?

A. On Exhibit “K.”

Mr. SHACKLEFORD.—That is the original stake pointed out to you?

A. Yes, sir. [160]

Q. Now, I will hand you a photograph that has been identified here as “I” and ask you if you are acquainted with that stake. A. Yes, sir.

Q. Are you acquainted with that old building there? A. Yes, sir.

Q. When did you first find any stake set in the same place or nearby—what time did you become acquainted with the corner post?

A. In the year 1893.

Q. That is one of the end lines of the Lotta claim?

A. Yes, sir, identical with post #5 marked on the plat there; what I call the southwest corner—this shown in the photograph here is not the original stake.

Q. You have become acquainted with the stake in 1893 and the cabin was there in 1893?

A. Yes, sir.

Q. What has become of that stake that was first there? You say you don't think that stake in the photograph is the same stake?

A. I didn't see that stake in the photograph; the

(Testimony of William M. Ebner.)

original stake, last fall when I was up there or last winter, rather, was right alongside of this larger stake shown in this photograph, and that stake, some six or seven years ago, I found that it had rotted and was just standing up, that is all, so I drove a stake alongside and wired it up to that.

Q. Put in a new stake?

A. Yes, sir—not this stake here; then we came along later and put in this stake right in the same place where the other stake was driven and the original stake was left standing [161] and nailed or wired to this stake and that original stake or what was left of it was there last fall or winter when I was up there.

Q. In 1893, when you first became acquainted with some sort of a corner post there, was there any marks that you could discern on that old corner post standing there, do you remember?

A. Yes, sir, I remember it was post #5; I know it was marked about the same as that plat there and U. S. Survey 87. I know it had those survey marks on. I couldn't say offhand what they were, but I think that is what was on there.

Q. Now, when you again saw that stake some time later on, you say it had become very much decayed. About how long was that after the year 1893?

A. That was probably along about—I think that was about eighteen—I don't just remember what year.

Q. Approximately how many years after—three or four or five years after?

(Testimony of William M. Ebner.)

A. Yes, five or six years afterwards.

Q. Now, about what distance was that old stake you saw there from that old cabin standing there?

A. I think it was about 60 or 70 feet, something like that. I don't know exactly.

Q. Now, when you replaced that with another stake, in what place did you replace that new stake with respect to the old cabin or where the old stake stood?

A. On the inside, leaving the stake on the outside; we were leaving the old stake still on the corner, but driving the new stake just behind it.

Q. What do you say as to whether or not that old stake when [162] you set the new stake was in the same relative position as when you first saw it?

A. Yes, it was.

Mr. HELLENTHAL.—We object to all the testimony offered with reference to the stakes on the ground of the Lotta, for the reason that the patent notes describe the Lotta claim with reference to natural objects and it doesn't make any difference where the testimony may show the stakes were, etc. Objection overruled. Defendant allowed an exception.

Q. Here is another photograph that is marked Exhibit "L." Is that either one of the stakes that you have been already describing as far as you can discern from the photograph, or do you know anything about it? A. No, sir, it is not.

Q. That is another stake? A. Yes, sir.

Q. Where is that stake?

(Testimony of William M. Ebner.)

A. The stake is about 125 feet in a southeasterly direction from the stake that I last described there and is what I call the Parish #2, the southeast corner of the Parish #2.

Q. Now, do you know anything about the setting of that corner? A. Yes, sir.

Q. Tell the Court what you know about it.

A. That stake is placed precisely where the original location stake was placed. I had the line brushed out and had it resurveyed, or run a survey around there, I think, in 1908, and this stake was placed here at that time in the identical spot where the original location stake was placed.

Q. Of what claim? A. Of the Parish #2.
[163]

Q. What corner stake is that? Is that the corner stake—

By the COURT.—He said a location stake.

The WITNESS.—No, the corner stake, the southeast corner stake of the Parish #2.

Q. Is that the stake you described to the Court a while ago, that you attempted to set in a line with the lower side line of the Lotta claim?

A. No, sir—no, this is not the one, this is on the side line of the Royal,—it is above, beyond, the side line of the Lotta.

Q. Yes, but if the side line of the Lotta was extended in a straight line, would it strike that?

A. Yes, sir.

Q. If the lower line of the Lotta was extended in a straight line, it would strike that post?

(Testimony of William M. Ebner.)

A. Yes, sir.

Q. Now, here is another photograph called Exhibit "H"—do you know anything about that stake?

A. Yes, sir.

Q. State to the Court what you know about it.

A. This is the post #5 as shown on that plat there, post #5, the southwest corner I call it, of the Lotta lode claim.

Q. Southeast corner, you mean,—5 here on Exhibit "B"? A. Yes, sir.

Q. What else, if anything, does that picture show?

A. That shows the end line of the Lotta and probably a portion of the Taku Gold & Silver brushed out, but most all of the end line of the Lotta.

Q. That is, it would be what end line of the Lotta?

A. The south, or the southeast end line of the Lotta.

Q. Is there any other object there that you desire to call [164] the Court's attention to?

A. Yes, I see a stake up on the hillside there.

Q. What stake is that?

A. That is one of the end line stakes of the Lotta lode claim,—and I think that is the lode line stake,—I wouldn't be sure about it.

Q. Of what,—of the Lotta?

A. Yes, of the Lotta.

Motion to strike latter part of answer as a conclusion.

Q. Do you know anything about that stake on the ground?

A. I have seen that stake on the ground quite a

(Testimony of William M. Ebner.)

number of times or a stake that looks just like it; I am satisfied that it is the lode line, 150 feet from the corner, from the looks of the ground here. A photograph somewhat distorts it, though, but I am quite well satisfied that is the place, but I know that is the end line,—I can tell that by the objects,—I know it is the end line of the Lotta.

Motion denied. Defendant allowed an exception.

Q. Here is another photograph marked Exhibit “J” for identification. How about that stake?

A. Yes, sir, I know where this stake is.

Q. Is that either one of the stakes you have been describing? A. No, sir.

Q. Where is that stake with reference to any natural objects?

A. That stake is alongside the Basin road, originally driven alongside the stringer to the bridge here, and is opposite, almost opposite, the compressor-house and is the end line of the Forrest and the side line of the Lotta.

Q. Is that stake there now?

A. It was there last fall. [165]

Q. It was there last fall and that is the last you saw it? A. That is the last time I saw it.

Q. How long have you noticed the stake being there? Whether it was this stake or some other stake, you can explain to the Court, but how long have you noticed the stake being there, approximately there at that same point?

A. That stake has been there, I think, ever since

(Testimony of William M. Ebner.)

1893 or 1894, when that ground was first surveyed for patent.

Q. That is one of the stakes of the Forrest lode claim?

A. That is one of the stakes of the Forrest claim, yes, sir.

Q. Have you had anything to do with the Forrest claim? A. Yes, sir.

Q. What does that belong to?

A. That belongs to what is called the Dora group.

Q. You are interested in that group of claims?

A. Yes, sir.

Q. Did you have that claim surveyed for patent?

A. Yes, sir.

Q. You had that surveyed for patent?

A. Yes, sir.

Q. Do you know that is the same stake?

A. That is the same stake and the same place.

Q. Do you know approximately when the survey was made?

A. I think it was made in 1893, I wouldn't be sure, but I think that is the time it was made.

Q. And it belonged to the Dora group of claims while you were interested in that group of claims?

A. Yes, sir.

Q. Who made that survey?

A. Charley Garside. [166]

Q. You are acquainted with the boundaries of that Forrest claim by reason of the survey and being a part owner, and you know that to be one of the stakes of it? A. Yes, sir.

(Testimony of William M. Ebner.)

Q. Do you know whether that stake was placed there before or after the Lotta survey?

A. It was placed there afterwards.

Q. It was placed there at the time the Forrest survey was made? A. Yes, sir.

Q. On what you contend to be the lower side line of the Lotta claim? A. Yes, sir.

Mr. SHACKLEFORD.—We object to that as being argumentative and calling for a conclusion of the witness and leading.

Objection sustained as leading.

Q. Where is it, then, with reference to the lower side line of the Lotta claim, on it or above it?

A. It is right on the line.

Q. You claim that in 1892 you became acquainted with the corner post that you identify in these photographs over there, located near this old cabin, and which you claim to be one of the corner stakes of the Lotta claim. Now, what other stake along that side line of the Lotta as you contend is the side line—besides this stake that you have described as being a corner post of the Forrest and showing the intersection of the Forrest with the lower side line of the Lotta, have you found any other stake along that line? A. I have not.

Q. Did you ever find the corner stake of the Lotta, that is, along that line where this Forrest intersects the Lotta? [167]

A. The corner stake of the Lotta?

Q. Yes. A. Yes.

Q. I mean along the side line,—you contend on the

(Testimony of William M. Ebner.)

lower side line there that the Forrest survey intersects one of its lines, a part of the Forrest set over on to the Lotta? A. Yes, sir.

Q. Now, have you got one of the posts there of the Forrest—on that same side line, the Lotta side line, outside of the stake you found there next to the cabin—have you found any other or seen any other stake there on that side line?

A. Not on the side line.

Q. Not on that side line? A. No, sir.

Q. What, if anything, have you done since you first became acquainted with the Lotta claim with regard to keeping this line of the Forrest and the other stake over across the creek near the cabin, along that line—what have you done in regard to keeping that brushed out or having that line resurveyed, since you first became acquainted with that property in 1895?

Mr. SHACKLEFORD.—We object to that as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

A. The first that we brushed out the side line of the Lotta was when we made the Forrest survey.

Q. (By the COURT.) When was that?

A. That was in the year 1893.

Q. In 1893 was it?

A. Yes, I am quite sure it was 1893.

Q. The survey will show it anyway? [168]

A. Yes, when that survey was made for the Forrest.

(Testimony of William M. Ebner.)

Q. You had that official survey made for the Forrest?

A. Yes, then I kept the stake brushed out. As soon as I became interested in the Ebner property I looked up all my stakes to preserve them, and the next time we brushed out that line was when we made the location of the Parish #2, and then I had it all rebrushed out and resurveyed in the fall of 1908.

Q. When the survey was made for the Forrest claim, whatever date that survey was—we will show the exact date later on—did you at that time see anything of this corner post that is over there near this old cabin? A. Yes, sir.

Q. And you next had that same line brushed out in 1908?

A. No, in 1899, when we located the Parish #2.

Q. Was that stake over there at the cabin at that time? A. Yes, sir.

Q. That is some stake—I mean one of these stakes there—was it a new stake?

A. No, when we made that location the old original stake was still in place.

Q. Since 1899 did you do anything towards brushing out that line?

A. Yes, we brushed out that line in 1908 around the stake; we kept that clear and kept the brush pretty well cut away from that, and the line uphill we brushed that out, I think, along about the same time, in 1899.

Q. Was that one of the end lines of the Lotta?

A. Yes, sir, the end line of the Lotta.

(Testimony of William M. Ebner.)

Q. Do you know who aided and assisted in doing that brushing [169] out in 1899—is there anyone here now?

A. I don't know if anyone is here now in particular. I took men from the crew.

Q. From your mill up there? A. Yes, sir.

Q. You were running the Ebner mill then?

A. Yes, sir.

Q. Now, in 1908, when you say you had some survey made there and some brushing out, who was with you at that time?

A. Well, I had Mr. Tripp, Mr. Hill, Mr. Wettrick and several more,—I don't remember all of them just now.

Q. What were you doing?

A. We were brushing out the lines and I told them to make the survey just about the same as they would make it for a patent.

Q. Of which? A. Of the Parish #2.

Q. Now, Mr. Shackleford said something this morning in his opening statement to the Court that Mr. Hill made some surveys for you of the Parish #2 at the time you staked it out—did he ever make any survey of the Parish #2, when you staked it out?

A. No, Mr. Hill was not present and was not around there,—I didn't employ Mr. Hill at that time.

Q. You made the location of the Parish #2 yourself, and who else was with you?

A. I had different men from the crew. I think my foreman was with me at that time.

Q. Who was he?

(Testimony of William M. Ebner.)

A. I don't remember. I think he was a man named Ross. I [170] wouldn't be sure. I didn't have the same people every day.

Q. About how many men did you employ up there around the mill?

A. I had five or six men part of the time.

Q. How many did you have in your employ running the mill? A. I had some thirty odd.

Q. And some of these people you took down there to assist you? A. Yes, sir.

Q. But in 1908 you had Mr. Tripp and Mr. Hill and Mr. Wettrick with you?

A. Yes, sir, and a man watching up there, the watchman, and I think a man named Kirk—I don't just remember how many men I had.

Q. Mr. Kirk is here also now? A. Yes, sir.

Q. Now, Mr. Ebner, that brushing out you did on what you are testifying about as being the lower side line of the Lotta, the brushing out you did in 1908,—how did that compare with what you did in 1899 with respect to being over the same ground?

A. It was over the same ground,—the brush had grown up again but we could see the old stumps, where it had been cut down.

Q. In 1908 when you did this brushing out, was this corner post you have described as being one of the Forrest stakes, that is 1908 when you did the brushing out—this stake that you have described as being one of the Forrest stakes, which you claim is on the side line of the Lotta claim, and also the stake over at the cabin—were these stakes there in 1908 when

(Testimony of William M. Ebner.)

Mr. Tripp and these people helped you brush it out?

A. Yes, sir. [171]

Q. Now, I will ask you, outside of these stakes, have you ever seen any other stakes of the Lotta lode claim, outside of those in the picture here that you have spoken about, did you see any other end line stakes—did you ever discover any of those or were they taken out by slides,—what do you know about that?

A. I saw the stakes described in the photograph, shown in the photograph. I saw all three of the end line stakes.

Q. Of what? A. Of the Lotta.

Q. When did you first see those?

A. I don't remember. Soon after I became interested in the property, soon after the organization of the Ebner Gold Mining Company, the next year.

Q. What have you done in regard to keeping those posts kept up?

A. I always done all I possibly could to preserve them.

Q. Was any of that ground subject to slides, where some of those end stakes were?

A. Yes, some of them were.

Q. How is this ground in reference to slides where this stake is near the cabin—has there been any slide there? A. You mean the ground or the hillside?

Q. I mean where the post is, next to the cabin.

A. No, I don't think so, not those, but further up there has been slides.

Q. Around this cabin if there had been any slides

(Testimony of William M. Ebner.)

of land there and where the stake is set for the cabin, you would have noticed it? A. Yes, sir.

Q. Well, has there been any slides? [172]

A. No, sir, there has not.

Q. Do you remember what stakes you saw on this Lotta claim besides the stake over there at the cabin, that is, when you first became interested in the property, along about that time,—in 1895?

A. I saw what was called the lode line stake.

Q. You say you saw what would be the lode line stake. Where was that stake with reference to this stake that you saw over at the old cabin?

A. That was 150 feet on the end line from the corner stake or stake #5, post #5.

Q. Did you notice any markings on that stake?

A. Yes, sir, at that time there was.

Q. Do you remember what they were?

A. I think it was lode line—I don't remember the number, Lotta—and then the survey number on the stake.

Q. Did you see any other stake besides that which you thought to be the lode line and which you read an inscription upon, on the Lotta claim, what you claimed to be that property at that time?

A. Yes, sir; I saw the corner stake of the Lotta 300 feet from post #5 and it would also be the corner stake of the Taku Gold & Silver claim, one stake, right in the corner on one side; it gave the date when surveyed and the other side, the other survey—on one side the Lotta survey and the other the Taku Gold & Silver.

(Testimony of William M. Ebner.)

Q. Any others?

A. I found one more stake and I think it was the lode line stake of the Taku Gold & Silver and then it went up so steep; that is all I found on that hillside.
[173]

Q. Now, what, if anything, did you do with reference to keeping these last described stakes which you supposed to be on the end line of the Lotta claim—have you kept those as well as you kept up the one at the cabin?

Mr. SHACKLEFORD.—We object to that as leading.

Q. Have you kept that up? A. Yes, sir.

Objection sustained. Last question and answer stricken.

Q. I will ask you whether or not you have done anything with respect to keeping these corner posts up? A. I have.

Q. About this lode line stake, what, if anything, have you done—the stake of the Lotta—I am talking about the Lotta?

A. The lode line stake, I think, is just where it has always been.

Q. And what about that other corner stake?

A. The other corner stake—one spring or summer when I went—

By the COURT.—The other? You mean the Taku Gold & Silver?

A. The corner stake of the Lotta and the corner stake of the Taku Gold & Silver, just one stake for both corners. That I found had been broken off,

(Testimony of William M. Ebner.)

and I took the stake and put it back and drove it in right alongside of the stump, so the stump and stake was there, and it was that way the last time I saw it.

Q. What about the stakes of the Parish #2? You commenced the first stake, you say—you set on the lower side line of the Lotta claim that first stake. Have you done anything with respect to keeping that corner intact, or keeping it up since the Parish #2 was located?

A. No, I think the original stake is still there.

Q. And what about the other corner stake you referred to, which was in a direct line or the projection of the lower [174] side line of the Lotta?

A. That stake in 1908 was replaced by a larger stake.

Q. That is when Mr. Hill and Mr. Wettrick were there helping you make a survey? A. Yes, sir.

Q. What did you find when you made that survey in 1908?

A. I found it was getting old and it was rotting, so we made a larger stake there to put in place of it. We found the old stake and put the larger one in place of it.

Q. You testified that you established that stake in the first instance and turned at right angles and then 300 feet further, making 600 feet, you set a corner stake—what have you done with respect to keeping those stakes up since you first staked out the Parish #2 claim?

Mr. SHACKLEFORD.—You are talking about

(Testimony of William M. Ebner.)

the Parish stake?

Judge WINN.—Yes, the end lines of the Parish # 2.

A. The Parish #2 lode line stake, I didn't find that, but we found where it had been and we put a stake there, a corner stake.

Mr. SHACKLEFORD.—We move to strike the answer of the witness stating he found where it had been. If he wants to describe the conditions, I want them specific.

The WITNESS.—We piled some rocks around it.

Objection overruled and motion denied. Defendant allowed an exception.

Q. You say you found where it had been. How do you know that?

A. We found where the rock had been piled around it. We could see where the monument had been and it being in a very prominent place on the rock there, I knew where it belonged where it was originally driven, and the little monument had [175] been scattered some, it still showed, and you could tell there had been a stake there, a monument built there.

Q. Who built that monument in the first instance?

A. I did.

Q. When you first staked the claim?

A. Yes.

Q. That was the corner stake of one of the end lines or was that the lode line stake?

A. That was the lode line stake.

Q. And you say you went into a straight line 300

(Testimony of William M. Ebner.)

feet further and put another corner post in in 1908. What, if anything, did you find with reference to that corner?

A. I found the old stake placed there at the time of location.

Q. What did Mr. Hill and Mr. Wettrick and you people do—did you leave the stake there or re-establish it?

A. The stake was left there. The other survey didn't come down quite as far as this was, and they placed the new stake about six feet further up the hill than what the old stake was. I got the old stake built too far according to their survey and we left the old stake there.

Q. Now, you started from that point to run the lower side line of the Parish #2 claim—did you go over that side line of the Parish #2 with Mr. Hill and Mr. Wettrick and Mr. Tripp when you were there in 1908?

A. I went over it with them as far as the road.

Q. What road?

A. They went as far as the creek and then Mr. Hill or Mr. Wettrick, I think—I don't know which one—took their instruments and went over on the road and I was not present when the entire side line was surveyed, but as far as the road, I was present.
[176]

Q. This property was located, the Parish #2, in 1899. I don't care now to go into any particular details about the work that was done at that time, up to 1906 and '07, and then we will go more par-

(Testimony of William M. Ebner.)

ticularly into detail. Were you there last fall on the Parish #2 claim? A. Yes, sir.

Q. Then, you have been on the Parish #2 since 1908 also? A. Yes, sir.

Q. Did you go over and look at those stakes and corner posts last fall? A. Yes, sir.

Q. That was after Mr. Hill and Mr. Wettrick had made a survey of the claim? A. Yes, sir.

Q. I wish you would commence then and state briefly, unless Mr. Shackleford wants it in detail, commence at the corner post, the first one set on the side line of the Lotta, about 125 or 150 feet from the corner of it, and tell what you saw about that corner post being there last fall?

A. That was there last fall, yes, sir.

Q. And running down 1500 feet to the first corner on a projection of the lower side line of the Lotta, where you established a corner—did you find anything there?

A. I did; we found where the stake had been, but there wasn't any stake there.

Q. What had become of it?

A. I don't know. It had been taken out, but I found just where we had set the stake.

Q. How could you tell it was where you had set it—that is, the corner post on the projection, I am talking about—you [177] come down here 1500 feet and set a stake—that is one of the corner stakes you said you set?

A. We came along here 125 feet; that stake was

(Testimony of William M. Ebner.)

all right, that was there last fall and this stake here 600 feet—

By the COURT.—He misunderstood your first question.

The WITNESS.—That stake around there, the southwest corner of Parish #2 was gone.

Q. Is that the place you say you could tell that that was a corner—was there anything there to indicate the monument?

A. Yes; I saw where we had cut the brush and where we had turned both ways—where we had come down one way and at right angles.

Q. Where you came down the end line?

A. Yes, sir.

Q. And then turned on the other side line?

A. Yes, sir, and there was pegs—I found some pegs—I could locate the corner, and there was a trail built right over this corner.

Q. Who built that trail there?

A. I don't know.

Q. Had any of your people?

A. Not that I know of—I don't know.

Q. (By the COURT.) This right angle business—do you mean you had swamped out the brush?

A. Yes, the southwest corner, which is a little ways from the Snowslide Gulch and that stake—somebody built a trail to get up there from Snowslide Gulch, and built right over where the corner was.

Q. Did you look after any more stakes on the Parish #2 than those you have already described?

(Testimony of William M. Ebner.)

A. I just looked—no, that is all. I came and went up and came down along the side line of the Lotta, that is, the old road, and then came down by Snow-slide Gulch.

Q. What year did you first commence doing assessment work on the Parish #2? A. In 1900.

Q. You say the first assessment work you did was in 1900? A. Yes, sir.

Q. Mr. Ebner, I will ask you if you have any record or recollection as to the number of days' work that was done on this claim in the year 1900?

A. No, I couldn't go into detail. I put my men—took them out there and kept them to work there at their regular wages until I had performed \$100, until the required amount of money or work had been done and money expended at their regular wages. One man would get \$2.00 and his board and the other probably \$2.50.

Mr. SHACKLEFORD.—I move to strike that for the reason that it is not competent evidence of assessment work, etc.

Q. I want to supplement that—

Mr. SHACKLEFORD.—We insist that each year be taken up and the place, time and persons, and the actual work done on the ground be shown.

Q. That first year of 1900, describe as accurately to the Court as you can what you had done on the premises of the Parish #2 lode claim?

Mr. SHACKLEFORD.—We object to the question, unless it specifies in the language of the statute so that the witness is called upon to state the

(Testimony of William M. Ebner.)

work and labor done, and not what he had done on the claim, but the work and labor.

Judge WINN.—I mean his assessment work for the purpose of [179] holding the claim,—that is what we are talking about.

By the COURT.—I think he should describe the character of the work and then set its value.

Q. I will ask you what kind of work and the character of work you did in 1900 in performing your assessment work on this claim?

A. We made an open cut on the Parish #2 just above the creek, where there is a very heavy spring comes out. We made an open cut there and then went to work and turned in some water and commenced, and did, I think, wash out or partially so, so as to get down to the surface, to the bedrock, one ditch leading towards this open cut. I don't remember just the value of each one separately, but those two items together cost in actual expenditure, wages paid to men, more than one hundred dollars.

Q. Was the work actually worth that in the way of assessment work, in benefit of the claim?

By the COURT.—That is leading.

Q. How much did that improve that claim as a mining claim?

Mr. SHACKLEFORD.—We object to the question as incompetent, irrelevant and immaterial and as calling for a conclusion of the witness.

Objection overruled. Defendant allowed an exception.

A. I consider that it improved it at least the

(Testimony of William M. Ebner.)

amount of money expended.

Q. Did you say you ran a ditch or something?

A. Yes, an open cut.

Q. What was the other piece of work?

A. Why, we started to cut and we brought the water in from Snowslide Gulch; repaired an old dam there and the ditch [180] they used at one time on the Borean placer and ran it around this cabin, or close to the cabin, and cut a ditch to it, until we got on the Parish and then we cut the roots and sod down to bedrock leading to this open cut, for the purpose of exposing the bedrock.

Q. In that year did you do the assessment work, in 1900? You had the Parish #1 that year too—this work that you have described was done for the benefit of what claim?

Mr. SHACKLEFORD.—We object to the question as incompetent, irrelevant and immaterial and as calling for a conclusion of the witness.

Objection overruled. Defendant allowed an exception.

A. Parish #2.

Q. You said something about a dam being up there and some stream that comes down from Snowslide Gulch. Explain to the Court the nature of that dam that was there in 1900.

A. Well, the dam is in a narrow point and there is a ditch cut on the side—this is in Snowslide Gulch itself—and it is a natural dam to a certain extent, and a dam that was built there years and years ago and a portion of the old dam is still there, and every

(Testimony of William M. Ebner.)

year a portion of the snow and rock and snowslides takes off the top and that has to be rebuilt to throw the water into the ditch and divert it.

Q. Which one of the claims is that on?

A. That is on the Parish #1.

Q. What was your object in keeping up the dam?

A. The object in keeping up the dam was to use this water for sluicing and developing these two claims.

Q. What do you mean by sluicing on a quartz claim?

A. Sluicing—that is to wash off the surface and expose the bedrock. [181]

Q. Expose the vein or lode? A. Yes, sir.

Q. Then, the next year, 1901?

A. In 1901 we continued this same work and done practically the same thing. I think in 1901 we completed this ditch across, or very near across, the claim.

Q. The work you did that year—what was the value of it in the way of a benefit to your claim?

Mr. SHACKLEFORD.—We object as incompetent, irrelevant and immaterial and calling for a conclusion of the witness, and we demand the production of the books of the Ebner Gold Mining Company, showing the amount actually paid.

By the COURT.—The question may be answered but your demand for any books within the control of the witness will be allowed if you specify the books.

Mr. SHACKLEFORD.—The books showing the

(Testimony of William M. Ebner.)

amounts paid out for work on the Parish #2 claim whatever they are,—whether they are in the possession of the witness or in the possession of the plaintiff.

By the COURT.—You may renew that motion later.

Q. What you actually pay out in each of the years 1900 and 1901 for work and labor—for work done on this Parish #2 lode?

Mr. SHACKLEFORD.—We object as incompetent, irrelevant and immaterial, calling for a conclusion of the witness and not the best evidence, and on the further ground that the length of time over which the witness is now testifying, ten years—the books of the company are patently the best and only evidence that can be relied upon.

Objection overruled. Defendant allowed an exception. [182]

A. The value of the money paid out and the work done there was more than \$100 for that one particular claim.

Q. For each of the years 1900 and 1901?

A. Yes, sir.

Mr. SHACKLEFORD.—We move to strike the last answer on the same ground.

Motion denied. Defendant allowed an exception.

Q. Now, in 1902?

A. In 1902 on the Parish #2 I think we worked most altogether on this ditch and {another ditch higher up; that is the best of my recollection, that we started another ditch higher up and finished the

(Testimony of William M. Ebner.)

first ditch that we started or a crosscut to expose the bedrock across the claim.

Q. In doing this sort of work, from a miner's standpoint, do you wash away the dirt and expose the vein so as to judge of its value and the formation, etc., of the claim? A. Yes, sir.

Mr. SHACKLEFORD.—We object to the question as leading and calling for a conclusion of the witness, and move to strike the answer.

Objection sustained as leading. Question and answer stricken.

Q. You say you have been mining I believe for the last twenty years? A. Yes, sir.

Q. I will ask you as a mining man as to whether or not this work did or did not tend to and did uncover the formation of the ground in the mining claim?

Mr. SHACKLEFORD.—We make the same objection, calling for a conclusion of the witness.

Objection overruled. Defendant allowed an exception.

A. Yes, sir. [183]

Q. What was your purpose in doing this work?

Mr. SHACKLEFORD.—We object to the question as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

Whereupon court adjourned until to-morrow (Wednesday) morning, May 24, 1911, at 10 o'clock.

(Testimony of William M. Ebner.)

Wednesday, May 24, 1911—Morning Session.

Continuation of the direct examination of Mr. WM. M. EBNER.

(By Judge WINN.)

Q. Now, Mr. Ebner, I believe last evening we got down to the year 1902 in regard to the assessment work being performed on the Parish #2 lode claim?

A. Yes, sir.

Q. I disremember whether I asked you the question or not up to that time as to whether for each one of the years the amount of money that had actually been paid out for this assessment work on this lode claim. If I did not, I will now ask you how much was paid out for this assessment work for each one of the years up to 1902, the time you commenced assessment work?

Mr. SHACKLEFORD.—We object as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

A. One hundred dollars, fully—probably a little more than one hundred dollars.

Q. Now, we have got down to the year 1903. I wish you would state, in the year 1903, what was done in regard to assessment work on this claim.

A. In 1903 we continued these ditches, these cross-cut ditches, and the open cut and thoroughly prospected the ground where [184] these ditches had been made the years before.

Mr. SHACKLEFORD.—We move to strike that portion of the witness' answer in which he said he

(Testimony of William M. Ebner.)

thoroughly prospected the ground.

By the COURT.—It will be stricken out. You can state in a detailed way, Mr. Ebner, what work you did—what this work consisted of.

A. Why, it was stripped down to bedrock, so I could get to the bedrock and I took assays to ascertain where the values, if any, existed across this claim. I found that there were values and then I made, that same year, we built a blacksmith-shop and started the approach or what you might say squared up for a tunnel.

Q. This work that you have been doing these years that you have described—I will ask you, Mr. Ebner, what was the purpose of performing this kind of work on this claim?

Mr. SHACKLEFORD.—We object as calling for a conclusion of the witness. Objection overruled. Defendant allowed an exception.

A. In the first place, I found some values when I located the ground. I wanted to ascertain if there was more values and where they were, for the purpose of starting a working tunnel and thoroughly and systematically and in a business-like way develop the claim. That was the purpose of it.

Q. I will ask you if you did start such tunnel?

A. Yes, sir.

Q. What year did you start the tunnel?

A. In the year 1903.

Q. Do you remember approximately upon what portion of the claim you started this tunnel? [185]

A. On Parish #2.

(Testimony of William M. Ebner.)

Q. What portion of the claim?

A. Near the centre of the claim, very near the centre of the claim, I should judge, both in length and width—not quite the centre of the claim in width but near the centre of the claim in length; that is only approximate because I did not measure it.

Q. Have you been over the flume that is constructed across the claim by the defendant company in this case? A. No, sir.

Q. You have not been over that flume?

A. Yes, sir.

Q. You have seen it?

A. I have seen it at a distance; yes, sir.

Q. I have a photograph here—I will state to the Court that I will call Mr. Pond later on to identify it, and I will state to Mr. Shackleford that this photograph was taken the same time the others were taken, some time last fall. I desire to have Mr. Ebner at this time identify this tunnel that he refers to and later on if Mr. Shackleford insists, I will have the photographer called. Mr. Ebner, I will hand you that photograph, which has a flume line across it, and ask you if you can point out to the Court where this tunnel is that you speak of.

A. That is the tunnel, I think, and I located that from this stream of water that comes down here and the trail that shows there on the side of the mountain. The tunnel isn't plain enough so that I can see down to the creek, but I am satisfied that is the tunnel.

(The photograph is marked for Identification Plaintiff's Exhibit "M.") [186]

(Testimony of William M. Ebner.)

Q. Will you indicate by a letter where that flume is? A. You mean the trail?

Q. No, the tunnel. Indicate by a letter on that.

A. It shows in the brush there. It is right there; it is rather indistinct.

Q. Have you described fully what was done there in 1903? A. Yes, sir.

Q. Did you run any part of the tunnel in 1903?

A. We squared up and got, I think, just underground; that is about all.

Q. Did you say you built a blacksmith-shop?

A. Yes, sir.

Q. Where did you build the blacksmith-shop?

A. About 200 feet below, right on the creek—right just above high water.

Q. Well, how did you get in there?

A. We went up the creek, up over the Last Chance placer, and followed up the creek that way. We had a log across the creek right there below Cape Horn.

Q. Did you do any trail building that year to get to the claim?

A. We had to do some—not much, what you would call trail building. It was very steep along the edge of the creek and we did some work.

Q. What did you pay for the assessment work that year?

Mr. SHACKLEFORD.—We object as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

(Testimony of William M. Ebner.)

A. One hundred dollars—something more than \$100.

Q. I will ask you if that claim was benefited to the amount of one hundred dollars by the work performed during that year? [187]

Mr. SHACKLEFORD.—We object as calling for a conclusion of the witness.

Objection overruled. Defendant allowed an exception.

A. Yes, sir.

Q. Now, we have got down to 1904. What did you do in 1904?

A. In 1904 we done some work in that tunnel, I think about ten feet, in that tunnel and we also done some work in this Borean pit. We turned the water in and got the rocks out of the way and got down to bedrock, I think. We were working to that end.

Q. Where was this blacksmith-shop built—on what claim? A. It was built on Parish #2.

Q. Did you use that blacksmith-shop for anything?

A. Yes, for sharpening tools, for sharpening the drills.

Q. What were you going to do with the drills, use them? A. Yes, driving the tunnel.

Q. And have you explained the work now that was done on the Parish #2 that year? A. Yes, sir.

Q. What did you pay for it?

Mr. SHACKLEFORD.—Same objection.

Objection overruled.

Defendant allowed an exception.

A. Paid something over \$100. I don't remember

(Testimony of William M. Ebner.)

how much it was over \$100.

Q. What was your purpose in running this tunnel?

A. The purpose was to drive that in under the Parish #2, for the purpose of developing the claim and the work in the Borean pit was for the purpose of developing the lode as it was exposed there.

Q. Now, this work that you had been doing prior to 1904,—I [188] will ask you whether or not that was any assistance to you in judging where to locate this working tunnel that you commenced?

A. It was, the ditches and trenches I cut across were. In other words, I wanted to know if there was any values in there and where and what direction to drive, and if there wasn't anything there, there wouldn't be any use in starting a tunnel.

Q. Now, in 1905?

A. In 1905,—I think almost all the work in 1905 was done in this tunnel.

Mr. SHACKLEFORD.—We move to strike the answer of the witness, unless the answer shows that he knows and saw the work done.

Motion granted. Answer stricken.

Q. You were up there on the claim during this year, 1905? A. Yes, sir.

Q. Do you know where the work was done?

A. Yes, it was done in this tunnel and the Borean pit, but principally in the tunnel.

Q. Do you remember or do you not remember the exact number of feet driven in the tunnel that year?

A. No; I don't remember the exact number of feet because it was done by day's work.

(Testimony of William M. Ebner.)

Q. What did you pay for it—the work that was done on that claim that year?

Mr. SHACKLEFORD.—We object as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

A. The amount paid for it?

Q. Yes. [189]

A. One hundred dollars or more.

Q. In 1906 state to the Court what was done.

A. In 1906 we confined our work to the tunnel altogether.

Q. Do you remember the exact number of feet driven that year, Mr. Ebner?

A. I don't remember the exact number of feet that it was driven.

Q. Did you examine the work at the end of the year? A. Yes, sir.

Q. Now, each one of these years up to 1906, did you pay out these amounts on the word of the party who did the work, or did you go and make any examination of the work yourself to determine?

A. The foreman that was working in the mine, he detailed these men to go down there and do this work. I looked after the work to a certain extent and knew that it was going on and about the time that he reported was spent there and the actual money that was paid these men is the way I know how much was spent there; and in 1905 we also built a trail. We found it was difficult to get there, to come up the creek or to come down that way, so we built a trail

(Testimony of William M. Ebner.)

down over the brow of the hill to make it shorter and get down that way.

Q. I will ask you, Mr. Ebner, if you have any of the Ebner Gold Mining Company's books here by which you can refresh your memory and tell the exact amount that was paid for assessment work on these two claims, the Parish #1 and Parish #2, commencing with 1902 up to and inclusive of the year 1906?

A. I can, yes, sir, from the books here. [190]

Q. What is this book I hand you now?

A. This is the ledger of the Ebner Gold Mining Company.

Q. Is that one of the books kept in the regular course of business, in the transaction of the business of the Ebner Gold Mining Company covering the years—so far as this case is concerned, from 1900 to 1906?

A. Yes, sir.

Q. Did you keep the books yourself?

A. No, sir.

Q. You had a bookkeeper? A. Yes, sir.

Q. During this time you were occupying what position with the Ebner Company, all during these years?

A. I was the president and manager.

Q. Do you know as to whether or not those books were kept in the regular way of keeping books for a concern of that kind?

A. Yes, sir, they were.

Q. Did you have any supervision over the keeping of the books yourself?

A. Well, I had, to a certain extent; yes.

(Testimony of William M. Ebner.)

Q. Now, I will ask you to turn to that page of this ledger and ask you if you can refresh your memory from the matters contained there, and state to the Court the exact amount of money that was paid out for the benefit of these two claims in performing the annual assessment work covering the years from 1900 to 1906, inclusive, of both years?

Mr. SHACKLEFORD.—We object to the use of the book because it is not an original memorandum made by the witness, because it is and appears to be a ledger, a book of secondary nature; as the witness has not made the memoranda himself, he cannot testify to it. [191]

(Question withdrawn.)

Q. Who kept your books and where is he, if you know?

A. Mr. Denby kept my books,—he is one of them.

Q. Do you know where Mr. Denby is now?

A. I do not.

Q. Do you know whether or not he lives in Alaska?

A. I don't think he does—no, he does not.

Q. What was your system of keeping these books and making these entries in your ledger during this time, the periods I have asked you about, that is, how was the ledger made up, what was the whole system of your bookkeeping up there?

A. Why, it was a double-entry system.

Q. This book is not the book of original entry—did you have any other books that were kept in connection with your business up there besides the ledger and journal we have here?

(Testimony of William M. Ebner.)

A. Yes, we had the time-book.

Q. Just state briefly what the time-book consisted of. What matter did that contain?

A. The time-book contains the men's time, each man separate. And they were kept in such a manner that it would show what work he done from day to day, each day, and what work he was working on.

Q. And would you transfer the entry from that book to any other book or books kept by the company?

A. From that, of course, we made up our pay-roll and then the pay-roll sometimes was copied—we adopted a system—at first we didn't, but after that we copied the pay-roll into the journal.

Q. Have you the journal here that was kept?

A. Yes, sir.

Q. Showing these items? [192] A. Yes, sir.

Q. There are two of them, I believe. Now, did these pay-rolls or time-books that you have here, that you have described to the Court, did they furnish you any basis of making the entries in your journal and ledger? A. Yes, sir.

Q. Well, what about that?

A. The time-book furnished the basis for making the entries on the pay-roll and the pay-roll for making the entries in the journal, as far as the labor was concerned; that is the way we got at the labor.

Q. Do you know what became of those time-books that had the original entry upon it and the pay-roll—are they in your possession?

A. No, they are not.

(Testimony of William M. Ebner.)

Q. What became of the time-books?

A. I don't know, those old time-books. I might find some of the later time-books but it is a long time since we operated—I don't know where they are.

Q. Are they here in town?

A. I don't know where they are. I have looked for them; in fact, I haven't looked for them, but I know they are not in existence, not all of them,—not the old time-books.

Q. Now, these journals that you have here and the ledger you have, were they kept in the regular transaction of your business up there, of the Ebner Gold Mining Company? A. Yes, sir.

Q. Now, I ask that you turn to those journals you have here and if you can identify any of the entries that appear in the ledger there, made from the journal, I wish you would do so. [193]

A. Everything that is in the ledger is in the journal.

Q. It is made in the journal in the same manner that it is kept in the ledger here, or do you have more items in your journal?

A. Well, it is more itemized there,—that is, some of it is; a good deal of it is, yes.

Q. Looking at your ledger account here—look at it and see—is there a method by which you can determine just where those entries are made in the journals? A. Yes, the pages are on here.

Q. Are the entries made in the ledger all found in these journals? A. Yes, sir.

Q. And found at the respective pages that are re-

(Testimony of William M. Ebner.)

ferred to in the ledger account? A. Yes, sir.

Q. You have gone over these entries, have you, in the journal, to see that they are correctly transferred—those entries in the journals, to see that they are correctly transferred to the ledger—have you examined them for that purpose?

A. Not lately; I did at the time they were made, years back I have.

Judge WINN.—Now I ask that the witness be allowed to refresh his memory from all these books and the ledger account, and I have them open here for examination by counsel on the other side—that he be permitted to state the amount of money paid out for assessment work done on these two claims for the years commencing with 1900 up to 1906, both years inclusive.

Mr. SHACKLEFORD.—To which we object because the books are not books of original entry; they are books of secondary nature [194] not kept by the witness and not identified by any one keeping the books.

(By the COURT.)

Q. You say you know nothing about where the original entry is? A. That is in the time-books?

Q. Yes.

A. The original entries are all in these journals, but these entries were taken from the time-books; that is, for instance, the time-book pertained to the labor—the foreman had charge of the men; he knew where his men were working every day; he had a certain department where he kept that himself; he

(Testimony of William M. Ebner.)

made a certain notation on the time-book where he was working and if he worked in the Parish, he would put a mark over that day and at the end of the month he would report and then the charge would be made.

Q. You say you know nothing about where these time-books are? A. No.

Q. You spoke of the pay-roll being made up from those time-books. Where are the pay-rolls? Was the journal made up from the time-book?

A. No, the journal was made up from the pay-roll, that is, as far as the labor was concerned.

Q. What became of the pay-roll?

A. Well, I don't really know; probably some of them exist yet. I haven't looked for those.

By the COURT.—I think the question is objectionable as far as refreshing his memory from the books is concerned.

Q. Now, from the identification we have made of these books, I will ask you, Mr. Ebner, what page of this ledger contains the account that you have just described, showing the [195] amounts of money you say were paid out during these years for this assessment work?

A. Page 99 of the ledger.

Q. And as I understand it, the entries in the ledger show the pages that these entries are found in those two other books that you term your journals?

A. Yes, sir.

Judge WINN.—Now, we offer that account and that page as the entry showing the amount of money paid out for the benefit of these two claims, cover-

(Testimony of William M. Ebner.)

ing the period of time we have just mentioned, for these years, and also we offer such pages of the journals in evidence as are referred to in this ledger account.

Mr. SHACKLEFORD.—To which we object, for the reason that the books have not been properly identified and the entries therein have not been testified to by anyone, and for the reason that the same are not books of original entry but are secondary books, and for the further reason that the loss of the original books has not been properly shown to lay a basis for the introduction of the books. Mr. Ebner himself says that the pay-rolls may be there.

Judge WINN.—If there is any question about that at the present time, I will have Mr. Ebner make a search for any other books he has testified to in the records and files and will offer them this afternoon.

Q. (By the COURT.) Did you have the same bookkeeper during all this time?

A. No, sir, several bookkeepers—there was a man named Denby and a man named Hart.

Q. During this period you have been asked about regarding these [196] books did you frequently find mistakes made by these men or were the books kept—did you find them reliable?

A. I found them, generally, reliable. I found some mistakes, but nothing more than would occur probably by any other book-keeper.

By the COURT.—You will be required to prove a thorough search for the books of original entry.

Q. I believe you covered the year 1906?

(Testimony of William M. Ebner.)

A. Yes, sir.

Q. Now, I will ask you if you had anything to do with the assessment work for the year 1907?

A. I did.

Q. State to the Court what was done during the year 1907.

A. During the year 1907, I had a man working up there as watchman named Oscar Harri and during the summer,—in fact, in the spring, as soon as the snow was off, I directed him to work on this Parish #2, and he turned the water in and worked in this Borean pit, not altogether, but most of his work was there, and towards fall we hired another man to help him, a man named John Sawney. I think, if I recollect right, I paid him something like \$66 for working there, besides the labor that was performed by this man Oscar Harri.

Q. Well, for the benefit of this claim, how much did you pay out in 1907 in labor?

Mr. SHACKLEFORD.—We move to strike out of that last answer what he told the man to do and what he paid them, there being no evidence upon which to base any valuation because the character of the work is not described.

Motion denied. Defendant allowed an exception.

Q. I will repeat that last question. For the benefit of [197] this claim how much did you pay out in 1907 in labor? A. Something over \$100.

Q. I don't believe you described just the nature of the work that was done. I wish you would do that.

A. The nature of the work was to expose the bed-

(Testimony of William M. Ebner.)

rock in this Borean pit, turn the water in there and wash that and expose the bedrock. It was to get on to the bedrock and expose it and prospect it and determine as to the width of the vein there.

Q. What did you do there in 1908?

A. In 1908 this same man was watchman there.

Q. Oscar Harri?

A. Oscar Harri; and I set him to work and told him what to do, and he done most of his work in the same pit. Towards fall I hired another man by the name of—I looked over the amount of work he had done—

Q. Who had done?

A. This man Oscar Harri, and ascertained the number of days he had worked there in actual labor, and to make up what I thought was not sufficient labor, not sufficient work, I hired a man, John Perelle, to go up there and do the work in this same pit, and drive an open cut along the trend of the ledge.

Q. You don't know whether or not anybody worked with John Perelle while he was at work up there,—whether anybody assisted him?

A. I told him to get a man but I don't know who the man was. I left soon after that.

Q. Do you know how many days' work John Perelle claimed,—for how many days you paid him?
[198]

Mr. SHACKLEFORD.—We object to that—what he claimed.

Q. How many days' work did you pay them for—each of them?

(Testimony of William M. Ebner.)

Mr. SHACKLEFORD.—We object. The question is how many days' work they did.

Judge WINN.—We will undoubtedly prove it by both of the witnesses—one is in the courtroom, the other is subpoenaed.

Objection overruled. Defendant allowed an exception.

A. I hired this John Perelle to go there and take another man and do ten days' work each.

Q. How many days did you pay for each?

A. For those ten days' work I was to pay him \$55, and I think they were to furnish some powder.

Mr. SHACKLEFORD.—We move to strike the latter part of the answer as to what he thinks they were to furnish.

Motion granted.

Q. You know you paid them for ten days' work each there?

A. Yes, I know I paid them \$55, which would bring the assessment work up on that claim to \$105. I am positive of that.

Mr. SHACKLEFORD.—We move to strike the answer of the witness after the words "\$55," as stating a conclusion and being argumentative.

Motion denied. Defendant allowed an exception.

Q. Now, Mr. Ebner, I asked you up to a certain time, I believe 1906, as to whether or not you took the work of these parties who performed labor there or whether you examined the work at the end of each year to ascertain whether or not there had been what you thought to be a sufficient amount of work

(Testimony of William M. Ebner.)

done. Now, for these last years I have questioned you about, 1907–1906, 1907 and 1908—I will ask you if you made any examination of the work at the end of each year [199] to ascertain what had been done.

A. I did, every year and more particularly in 1907. I was very particular in 1907, and I went over the work very carefully, and I asked this man Oscar, “How many days did you work there?” and he said, “I put in so many days’ work.” I knew just how much he was getting—we paid him so much and his board and that amounted to approximately so much and I put it down low enough, put it in at \$2.25 a day, I think, what he did there, and that not being sufficient, I hired this man, this man John Perelle, to make up the difference.

Q. Who performed the assessment work in 1909 up there?

The COURT.—The witness has just been testifying as to 1907?

Judge WINN.—1908—the last was about 1907, as I understood it.

The WITNESS.—My answer was as to 1907, yes, but we have taken in 1908. It was in 1908 that John Perelle and his partner done the \$55 worth of work.

Q. That was the year 1908 you had John Perelle and the other fellow to do ten days’ work each?

A. Yes.

Q. And you have already testified as to what Oscar Harri did that year of 1908?

A. Yes, sir.

(Testimony of William M. Ebner.)

Q. Now, I will ask you who did the assessment work for 1909?

A. In 1909 Mr. Tripp done the assessment work. I gave him permission to do the assessment work, authorized him to do it.

Mr. SHACKLEFORD.—We object, and move to strike the answer of the witness as stating a conclusion. If he wants to state any conversations with Mr. Tripp or the relations Mr. Tripp had to the work, it is different, but it seems to me it is improper on direct examination to say he gave him permission [200] to do so.

By the COURT.—State the conversation, if you remember it, or the correspondence or whatever manner Tripp was employed by you or directed by you.

Judge WINN.—I expect Mr. Tripp has the letters written him, and I expect to introduce that letter, written by Mr. Ebner—this is simply preliminary. I am simply asking if he did have anybody do the assessment work or gave anybody permission to do it. I will follow it up by Mr. Tripp with the letter later on.

By the COURT.—The objection will be sustained. The answer that he gave him permission, would not be employing him or give him authority to do the work on the part of the company.

Judge WINN.—We will ask an exception—we will introduce the letter later on.

Plaintiff allowed an exception.

Q. I will ask you if there was any assessment work done up there in 1909 under your supervision, that

(Testimony of William M. Ebner.)

Mr. Harri or any one else did?

A. Yes, there was.

Q. Mr. Harri is here to testify to that?

A. Yes.

Q. And the remaining part of the assessment work you did not do yourself for that year 1909?

A. No, sir.

Q. Do you know under whom, or who did perform the assessment work that year? A. Mr. Tripp.

Q. Now, I will ask you if over these years you have testified concerning and while you were engaged in the mining business, as you say, as president of the Ebner Gold Mining Co., as manager, [201] I will ask you if you ever had any dealings with the Alaska-Juneau Gold Mining Company in the way of business affairs during those years, that is, did the Ebner Gold Mining Company have any, through you?

Mr. HELLENTHAL.—We object to that.

Judge WINN.—This is for the purpose—whether admissible or not, I will submit it to the Court—of showing that right through all these years this corporation was doing business as a corporation and prosecuting business in Alaska, and it was also transacting business with the defendant company, and it does not lie in the mouth of this defendant to deny the capacity of this corporation.

Mr. HELLENTHAL.—If that is the purpose of it, we will make our objection more specific. If it is to prove the *de facto* existence of this corporation, it is inadmissible, for the reason that there was not at that time, or at the time of the pretended incor-

(Testimony of William M. Ebner.)

poration, an existing law under which the corporation could be organized and no *de facto* corporation can exist, regardless of the dealings of the corporation or regardless of the recognition of the corporation or regardless of any act that may be done by the intended incorporators unless there is a valid, existing law under which the corporation could have been organized had the proper steps been taken.

By the COURT.—There was some law that corporations could be organized under and do business in Alaska?

Mr. HELLENTHAL.—Our contention is that there was no law under which the corporation could be organized in the District of Alaska. The law under which this corporation attempted to incorporate was the law in force in the State of Oregon [202] which was made the law of Alaska as far as applicable. Our contention is that it was never made the law of Alaska because not applicable to the conditions of Alaska, and there being no law under which a *de jure* corporation could be organized, there could be no *de facto* corporation—there can be no corporation by estoppel.

Mr. SHACKLEFORD.—And the further objection to it that the fact that it is competent under this ruling to show that it was a *de facto* corporation—the fact that they had business with parties from time to time in a casual way in which the party was not called upon to look up the question or inquire into the legal capacity of the plaintiff to sue in reference to transactions, unless they refer to this

(Testimony of William M. Ebner.)

particular property in controversy, could not prevent us from raising the question in this suit, and I apprehend that Judge Winn does not make any claim that there was any transaction between the parties concerning the property in controversy.

After argument the objection was by the Court overruled. To which ruling defendant is allowed an exception.

Q. Go ahead, Mr. Ebner.

A. That is about all the business we had, when the right to a patent to the Colorado lode claim arose and the Ebner Gold Mining Co. adversed them. The Ebner Gold Mining Co. brought an adverse suit in this court.

Mr. HELLENTHAL.—We object as not responsive, and we object because the testimony is not the best evidence.

By the COURT.—It is not the best evidence. The objection will be sustained.

Judge WINN.—That is all, Mr. Ebner, at this time. [203]

Cross-examination.

(By Mr. SHACKLEFORD.)

Q. When you discovered the Parish lode claim, I understand you want the Court to understand that you located the discovery stakes at the point of discovery? A. Yes, sir.

Q. And you put on that stake, in a tin can, a copy of the notice of location? A. Yes, sir.

Q. On the day of discovery?

(Testimony of William M. Ebner.)

A. Yes, about that time—probably a day or two afterwards.

Q. What time was it with reference to the discovery?

A. I think it was—I made this discovery about two days before the location was made.

Q. Before the location? A. Yes.

Q. And you didn't post any notice when you made your discovery?

A. Not the same day that I made the discovery.

Q. Where are the assay certificates of that rock?

A. I don't remember. I don't think there were any assay certificates—I don't remember.

Q. Don't you know whether they made any assays of that rock? A. Yes, they made assays.

Q. You stated in your direct examination that you made assays before you staked your claim?

A. I made assays and took the rock and took a mortar and pounded it out and got colors besides.

Q. But on your direct examination you said you got specific assays from your discovery of the rock, before you staked your claim, didn't you?

A. Yes, sir. [204]

Q. And you say that now? A. Yes, sir.

Q. Was that before you put in your discovery stakes, your notice? A. Yes, sir.

Q. Who assayed the rock?

A. I think it was assayed by my own assayer—I am not sure, though.

Q. Who was your assayer at that time?

A. I think that John Roth did the assaying then?

(Testimony of William M. Ebner.)

Q. That was in what year? A. 1899.

Q. And the property was staked without the aid of a surveyor?

A. Yes, without the aid of a surveyor.

Q. Staked by using a wire for measurement?

A. We had a hundred foot tape and for the purpose of stretching across the creek and these wide gulches, we used a wire and laid it out in 100 foot lengths and 50 foot lengths—100 foot lengths, I think, for the purpose of getting near the creek measurement without going up and down, not having an instrument.

Q. And subsequently you had the claim surveyed, when was that—1908? A. 1908; yes, sir.

Q. As far as you know, that is the first time that Mr. Hill went on the ground?

A. As far as I know, that is the first time that he done any work—he might have been on the ground before.

Q. Your original location with wires and tape was so near accurate that you—the posts were all checked and it was so nearly correct, only three or four feet off— [205]

A. I think about six feet off.

Q. And that is the corner over toward the Colorado? A. Yes.

Q. When did I understand you to say in your direct examination the survey on the Forrest was made?

A. The first official survey on the Forrest was made in 95, that is the first official survey that was

(Testimony of William M. Ebner.)

made, and the then patent was delayed—the people who were associated with me failing to put up the money, it was delayed and delayed until we had to make a resurvey and had to go over the same thing again in the surveyor general's office in making the application.

Q. This is the state that you found on the Forrest in 93 (referring to photograph)?

A. No, that is not on the Forrest. That stake was there in 93—I won't be sure that this stake (indicating)—from the photograph that looks—the stake that was there in 93 was a 2x4, and this tree here, these surrounding trees, more particularly this tree and that tree, I remember that.

Q. You testified yesterday in your direct examination you remembered seeing that stake there, didn't you?

A. I wasn't sure yesterday. I said it looked like it.

Mr. SHACKLEFORD.—I have been *exhibited* to the witness exhibit "K."

Q. So you didn't make that statement yesterday in your direct examination that this was the stake?

A. If I did, I didn't mean to. I know the surroundings there. I know the stake is in the exact location but whether that is the same stake, I wouldn't be positive about that.

Q. And that was in the year 93? [206]

A. Well, the first time I saw that was in 1892—the first time I saw that, I think, was that year, in 1893, yes—I wouldn't be positive whether I testified

(Testimony of William M. Ebner.)

it was 1893 or not.

Q. What is that, the southwest corner of the Lotta?

A. No, I call that the northwest of the Lotta.

Q. Did you see the southwest corner at the same time?

A. Yes, I saw the southwest corner back in 1893.

Q. The southwest corner of the Lotta. Then, you were mistaken last year when you made an affidavit in this court, sworn to in the State of California and County of Los Angeles, that you first saw it in 1894?

A. Well, if I said 1894 the first time, that is wrong. I saw it in 1894, but that wasn't the first time. You have reference now to the southwest corner of the Lotta?

Q. Yes, the southwest corner of the Lotta. Your statement in your affidavit, then, was to the following effect, that the first time you saw this corner was in 1894 and the last time in the summer of 1909—so far as its being the first time you saw that corner is incorrect?

A. That part is incorrect, that I saw it the first time in 1894. I saw it in 1894, but the first time I saw it was in 1893.

Q. I understand from you that you set men to work on this assessment work and when you were notified of their daily wages, that it had equalled the sum of \$100 for the year's work, that the work ended?

A. Yes, sir, fully one hundred dollars, yes, sir.

Q. They had a certain daily rate of pay?

(Testimony of William M. Ebner.)

A. Yes, sir.

Q. And they were set to work and when that pay reached the sum of one hundred dollars, the work ended? A. Yes, sir. [207]

Q. Now, I wish you would take the plat that has been introduced in evidence here and mark on the ground approximately the position of the work on the ground with reference to its distance from the various corners of the Lotta as claimed by you—there are two places where the work was done, one in the Borean pit and the other in the tunnel?

A. And the ditches and crosscuts; yes, sir.

Q. The ditches were part of the work in the Borean pit? A. No, not in the Borean pit, no.

Q. Just show the Court where the ditches were.

A. This Parish claim comes out here about 125 feet according to measurement.

Q. From Corner #5 of the Lotta extended?

A. Yes, sir; and comes in here, and the Borean pit is in here.

Q. On the boundary line?

A. On the boundary line, yes, sir, and the creek comes down along in here somewhere.

Q. You don't intend to say that the creek runs through or anywhere near the southwest corner of the Parish?

A. No, it comes probably about like that and then turns off like this. Now, that is wrong getting it up there, but this is on a small scale and it would not go down very far there. We brought the water in over like this.

(Testimony of William M. Ebner.)

Q. Mark the Borean Pit "A"?

A. That is the Borean pit right there.

Q. Mark it there. (Witness does so.)

The WITNESS.—(Continuing.) We brought the water in here and started to crosscut in these ditches here, and we came along here and cut another one like that and came a little further and cut another one like that—that is alongside of the creek [208] here. Here is where there was an open cut for a distance of about twenty-five feet.

Q. Did you cut that? A. Yes, sir.

Q. When was that cut?

A. That was cut during the different years. I think we started some of the work in 1899, not very much, but for the purpose of prospecting the claim and this open cut I spoke of is there. The tunnel is almost below that, below that open cut down by the creek, above high-water mark, and the Borean pit is there and the tunnel comes down below.

Q. Are these ditches open ditches on the ground?

A. We had to cut the roots and sod and get down to the bedrock.

Q. How much of the underground work is there on the Parish lode?

A. I think that tunnel there is twenty-odd feet. I don't remember just how much, but it was over twenty feet the last measurement I made there.

Q. Where did you do your work on the Parish #1?

Judge WINN.—I object to that—the Parish #1 lode is not in litigation. The question is incompe-

(Testimony of William M. Ebner.)

tent, irrelevant and immaterial for any purpose whatever in this case.

Objection overruled. Plaintiff allowed an exception.

A. The work on the Parish #1 was on the south side of the Borean pit and above the Borean pit and in Snowslide Gulch.

Q. The Borean pit lies along the boundary line of the Parish #1 and Parish #2?

A. Most of it is on the Parish #1.

Q. And the mountain is on an incline there and the Parish #1 stands on the mountain above the Parish #2, up the hill? [209]

A. Yes, there was a difference in elevation,—not a great deal.

Q. They are end to end claims, running up the hill?

A. Yes, when you pass Snowslide Gulch, it is very steep; yes.

Q. It don't make any difference whether you pass Snowslide Gulch or not, all the way up the creek up there the Parish #1 is the upper one of the two?

A. Yes, sir, it is the upper—it is higher; it is the higher of the two.

Q. How many feet of underground work did you say there was?

A. The last time I measured it, I think there was something over 20 feet, some twenty-odd feet, but I don't remember the exact number of feet.

Q. It was all on #2?

A. Yes, it was all on #2.

Q. Is there any underground work on #1?

(Testimony of William M. Ebner.)

A. Yes, sir.

Q. What is that?

A. That is in Snowslide Gulch?

Judge WINN.—We object to that as incompetent, irrelevant and immaterial.

Objection overruled. Plaintiff allowed an exception.

Q. This claim was located as a quartz claim?

A. Yes, sir.

Q. Do you know where the ditch work, the work of running the water as you claim it, over the ground, took place, with reference to the position of the present Alaska-Juneau flume?

A. The Alaska-Juneau flume is way down in the canyon, way down away from all this. This is up on the mesa, or up on the flat? [210]

Q. That is the Borean work?

A. And the other ditches, all of the other ditches.

Q. The ditches were used, as I understand it, to bring water down to wash off below?

A. No, to wash off on the flat, above the creek—there is quite a steep bank where that flume is.

Q. Where is the open cut—right against the creek according to this plat, is it not? A. Yes, sir.

Q. Mark that “B.” (Witness does so.)

Q. Where is the open cut with reference to that tunnel in Plaintiff’s Exhibit “M” for identification?

A. You go up a little to the right and where the springs come out here,—this doesn’t show the detail. There is some lumber lays there and some quartz piled up right there, but it is a little to the right I think,—

(Testimony of William M. Ebner.)

right close to where that water comes up.

Q. Mark that "C" with your pen on that photograph. (Witness does so.)

Q. When did the Ebner Gold Mining Company go out of possession of the property in controversy,—when did the Ebner Gold Mining Company turn over the possession of the property in controversy to the California & Nevada Copper Company?

Judge WINN.—We object to that as incompetent, irrelevant and immaterial and not proper cross-examination.

Overruled. Plaintiff allowed an exception.

A. You mean the possession of the property?

Q. Yes.

Judge WINN.—We object as calling for a conclusion of the witness. It calls for a legal conclusion and which is the bone of contention in this case.

* * * [211]

Objection overruled. Plaintiff allowed an exception.

A. I never turned over possession, the way I understand it. I am the President of the Ebner Gold Mining Company and I never turned over the possession—I told you that.

Q. Are you still one of the owners claiming the property? A. Yes, sir.

Q. You are a creditor of the California & Nevada Copper yet?

Judge WINN.—We object to that as incompetent, irrelevant and immaterial.

Objection sustained. Defendant allowed an exception.

(Testimony of William M. Ebner.)

Q. You have an interest in the result of this suit?

A. I might have.

Q. You have not been fully paid for your stock in the Ebner Company by the California & Nevada?

Judge WINN.—We object as incompetent, irrelevant and immaterial, and so far as we are concerned, we will admit that the witness has an interest in the suit.

By the COURT.—The objection will be sustained. The witness himself has admitted he has an interest, a contingent interest. Defendant allowed an exception.

Q. When did you go out of the possession of the property yourself—as an officer of the Ebner Company?

Judge WINN.—Same objection—incompetent, irrelevant and immaterial and as calling for a legal conclusion of the witness.

Objection overruled. Plaintiff allowed an exception.

A. When did I go out of the possession?

Q. Yes.

A. I don't consider I ever went out of the possession.

Q. You went away and left Mr. Tripp in charge here? A. Yes, sir. [212]

Q. He is not an employee of the Ebner Company, is he? A. No, sir.

Q. Did you leave anyone here representing the Ebner Company?

A. I did for a long time; yes, sir.

(Testimony of William M. Ebner.)

Q. Is there anybody here now representing the Ebner Company except yourself? A. No, sir.

Q. Was there anybody here last fall representing the Ebner Company except yourself?

Judge WINN.—We object as calling for a conclusion of the witness. If he wants to know the facts about how Mr. Tripp was up there, he should inquire about it. He is trying to get the witness to admit himself out of the possession of the property and I say the reason that that is one of the contentions here and their main contention, I do not believe he should be permitted to ask the witness those questions in that form.

Objection overruled. Plaintiff allowed an exception.

Q. Is there anybody else besides yourself here?

A. Not that I know of.

Q. You changed your residence about eight months ago and moved to Hollywood, California, I understood you to say? A. Yes, sir.

Mr. SHACKLEFORD.—That is all.

Redirect Examination.

(By Judge WINN.)

Q. Now, about this question of possession. I will ask you to just explain to the Court how Mr. Tripp and those people were on that property and under whose permission they went on to the property and for whom this assessment work was being done—go ahead and explain it fully. [213]

Mr. SHACKLEFORD.—We object to the ques-

(Testimony of William M. Ebner.)

tion for the reason that it calls for a conclusion of the witness.

Objection overruled. Defendant allowed an exception.

A. Why, I don't know just how—

By the COURT.—Read the question, Mr. Reporter.
(Question read.)

A. Why, Mr. Tripp represents the parties who are buying, purchasing, this Ebner property and who have the property under option, and in that way I gave Mr. Tripp, as their representative, permission to go on there and do certain things,—that is, to develop any work they wanted to do and do the assessment work.

Mr. HELLENTHAL.—We object as not the best evidence.

Mr. SHACKLEFORD.—The witness is not referring to any conversations, letters or communications with anybody. He is simply making an address on what was done and that is the reason I objected to the question originally.

Q. Anything further? A. That explains it.

Mr. SHACKLEFORD.—We move to strike the testimony of the witness because it does not refer to any conversations, communications or acts between parties. Simply gives his construction of it.

Judge WINN.—We resist the motion.

By the COURT.—The objection will be sustained in this form. You said you were going to introduce letters, etc.

Plaintiff allowed an exception.

(Testimony of William M. Ebner.)

Q. I will ask you if you have had any conversation with anyone about permitting anyone to go on this property, and if so, with whom? [214]

A. I had a conversation with one F. L. Underwood, who has an option to purchase this property and he told me that Mr. Tripp—

Mr. SHACKLEFORD.—We object to what Mr. Underwood told him and I desire to ask the witness a few questions.

By the COURT.—Very well.

(By Mr. SHACKLEFORD.)

Q. Your transactions with Mr. Underwood with reference to the title to this property are in writing, are they not? A. Yes, sir.

Q. These matters have been carefully gone over by counsel and you have got all of the important transactions between you in writing, haven't you?

A. Yes, sir.

Q. (By the COURT.) The matter about which you are starting to explain, has that been in *any included* in these writings? A. No, sir.

By the COURT.—The objection will be overruled. The whole conversation may go in.

Defendant allowed an exception to the ruling.

A. Why, Mr. Underwood told me that Mr. Tripp was his representative here, to do whatever they saw fit on the property, and that Mr. Tripp would do the assessment work, so I gave Mr. Tripp permission to go on and do the assessment work for 1909.

Q. Is that all the conversation you had with Mr. Underwood about Mr. Tripp going on there?

(Testimony of William M. Ebner.)

A. In a condensed form—that is the sum and substance of it.

Q. Did you ever have any conversation with Mr. Tripp about his going on there and doing the assessment work?

A. Yes, in 1909, I had a talk with Mr. Tripp. He said he would [215] go on and do the assessment work and see Oscar Harri and see how much more was required, outside of what he had done and see that the assessment work was done for 1909.

Judge WINN.—I think that is all now. I will desire to recall Mr. Ebner further on.

Recross-examination.

(By Mr. SHACKLEFORD.)

Q. Is it a fact that the full purchase price from the California & Nevada Company to the Ebner Gold Mining Company has been paid—the full purchase price due from the California & Nevada to the Ebner people has been paid?

Judge WINN.—We object to that as incompetent, irrelevant and immaterial.

Objection overruled. Plaintiff allowed an exception.

By the COURT.—It might be important to determine whether this is a moot case or not. If you are undertaking to say that this is simply a moot case and the Ebner people have no further interest in this property, it may be shown, if you can show it.

Q. I ask you if the purchase price of the Ebner property has not been fully paid by the California & Nevada Company?

(Testimony of William M. Ebner.)

Judge WINN.—We object as incompetent, irrelevant and immaterial, and as not the best evidence and not proper recross-examination.

Objection overruled. To which ruling plaintiff is allowed an exception.

A. I don't know anything about the California & Nevada Copper Company, but the full purchase price, the contract made with Mr. Underwood, has not been paid.

Q. You have had no transactions with the California & Nevada Copper Company? [216]

A. No, sir.

Q. You have been aware have you not that for the past two years the California & Nevada Copper Company has been selling bonds and Mr. Underwood, too, with the representation that they were the owners of the Ebner property?

A. I don't know anything about that.

Judge WINN.—I object to that as incompetent, irrelevant and immaterial. We are not standing here as sponsor for the morals of any corporation seeking to do business that we are not connected with, etc.

By the COURT.—The question is answered.

Objection overruled.

Plaintiff allowed an exception.

Mr. SHACKLEFORD.—That is all.

Witness excused. [217]

[Testimony of Lloyd G. Hill, for Plaintiff.]

LLOYD G. HILL, called and sworn as a witness in behalf of the plaintiff, testified as follows:

(Testimony of Lloyd G. Hill.)

Direct Examination.

(By Judge WINN.)

Q. What is your business? A. Surveyor.

Q. How long have you lived in Alaska?

A. I have lived in Alaska nearly thirteen years.

Q. You were formerly associated with George W. Garside during his lifetime in the surveying business here in Juneau? A. I was.

Q. The firm name was what?

A. Garside & Hill.

Q. Is Mr. Garside living now?

A. He is dead.

Q. That is George W. Garside?

A. George W. Garside.

Q. Now, when did you first come to Alaska?

A. I came to Alaska in the spring of 1898.

Q. With whom did you become associated in business, if with anyone?

A. Well, I was not associated in business at that time, I merely acted as an assistant, chain-man, and also in the office with my brother-in-law Garside.

Q. Did he hold any position as a surveyor in Alaska?

A. At that time, yes, sir,—he was United States deputy surveyor.

Q. In 1895, did you say?

A. In 1898, the spring of 1898.

Q. I will ask you if you are acquainted with what is commonly referred to as the Ebner property, up Gold Creek from Juneau? [218] A. I am.

Q. When did you first become acquainted with any

(Testimony of Lloyd G. Hill.)

of that property? A. About in May, 1898.

Q. Some time in May, 1898? A. Yes, sir.

Q. Did you go in and upon any of the property at that time? A. I did.

Q. With whom? A. With Mr. Garside.

Q. What did you go up there for?

A. We went up to survey the southwest side line of the Lotta claim, survey #87.

Q. What year was that? A. 1898.

Q. Now, I will ask you if you have been more or less familiar with that property ever since that time?

A. Yes, sir, I have.

Q. I will hand you a plat and ask you to look at it and ask you if you had anything to do with the drawing and the making of that plat.

A. I did, yes, sir.

Q. I will ask you if you are acquainted with the different mining claims and the objects, etc., that are placed upon this map, that is, by going over it, in and upon the ground and making surveys and running lines?

A. Yes, I am acquainted with practically all of it as shown on this plat.

Q. I will ask you if the platting, etc., on this map was done by you or under your supervision?

A. Yes, it was. [219]

Q. The mining claims and natural objects that are on there—I will ask you if they are correctly put on there from an actual running of the lines and also data and information you gathered from the surveyor-general's office, etc.?

(Testimony of Lloyd G. Hill.)

A. Yes, sir, they were—that is the way it was put on.

Q. Now, Mr. Hill, you say you first went on this property that is in controversy in 1898—I will ask you to refer to this map and plat that you have made and state to the Court what boundary line of the Lotta claim you referred to a while ago that you had something to do with in 1898. What line of the Lotta claim was it?

A. I ran the southwest side line of the Lotta claim or the line 5-6, between stakes #5 and #6,—that is, I assisted in running it.

Q. Have you ever run over the exterior boundary lines of the other claims that are on this map or to what extent have you? Explain shortly to the Court.

A. I practically ran over the northeast end lines of the entire Ebner group and also some of the south-east end lines.

By the COURT.—That would be the northeast end line or the northwest end line?

A. The northwest end lines.

(The plat is marked for Identification, Plaintiff's Exhibit "N.")

* * * * *

Q. That was in 1899, when you were over this claim again so that you observed anything about the monuments on it?

A. I was over that claim again when I made an official survey of the Idaho placer and Colorado lode.

Q. (By the COURT.) When would that be?

A. That would be in 1904, I think. [220]

(Testimony of Lloyd G. Hill.)

Q. It is marked on this map 1904, Colorado lode survey 641, 1904? A. Yes, sir.

Q. I will ask you at any of these trips up to the present time had you seen anything of any other stakes that afterwards were claimed by Mr. Ebner to be the stakes of the Parish #2 or the Parish #1 lode claim?

A. The first time I saw any of the Paris stakes was in—I saw the stakes in 1899, I think—there was some small stakes there and I didn't know what they were, the marking had sorter disappeared from them and I didn't know just what they represented.

Q. Then, when you went on to make the survey of the Colorado in 1904, did you see any of the stakes of the Parish #2 or the Parish #1?

A. Yes, I did. I saw the common end line between the Parish #1 and #2 at the time of the official survey of the Colorado claim.

Q. What is the common end line represented on this map and plat by? Will you name it?

A. The common end line would be the southeast end line of the Parish #2 and the northwest end line of the Parish #1.

Q. Between what two numbers?

A. It is between #3 and #4—it is line 3-4 of the Parish #2.

Q. Did you see any of the Lotta stakes then, in 1904?

(Testimony of Lloyd G. Hill.)

* *sir, they were my initial starting point again.
make the survey of what?
make the survey of the Colorado*

at stakes of the Lotta claim did you find on the
[221]

A. In 1904 I found post #5 of the Lotta and post #6 of the Lotta.

Q. Where were the posts then with respect to where they were when you had seen them before?

A. Same position, same place.

Q. That is in 1904? A. Yes, sir.

Q. You and Garside made the official survey for the Colorado lode claim?

A. Yes, sir, we assisted in that.

Q. Now, Mr. Hill, did you have anything to do with the survey of what is termed on here Forrest lode claim survey 545, made in 1900?

A. Yes, sir, I assisted George W. Garside on that survey.

Q. You were up on the ground with him?

A. Yes, sir.

Q. In making the survey of the Forrest lode claim, to whom did that claim belong and for whom were you making that survey?

A. The Forrest lode claim with others belonged to William M. Ebner and T. C. Scott.

Q. It belongs to what is called—

A. The Dora Gold Mining Company.

Q. I will hand you this tracing, the certified copy of plat, and I will ask you if you had anything to

*Omitted words do not appear in original Certified Transcript of Record.

(Testimony of Lloyd G. Hill.)

do with the surveys indicated on this?

A. Yes, sir.

Mr. HELLENTHAL.—These are the Forrest surveys?

Judge WINN.—Yes, I am going to identify them.

Q. You say you did?

A. I assisted on that entire survey?

Q. You assisted on that entire survey?

A. Yes, sir. [222]

Q. On all the claims represented on that plat?

A. All the surveys included in Survey #545—that is, the Dora group.

Q. Does that have the Forrest as one of the claims in it?

A. Yes, sir, the Forrest is one of the claims.

Judge WINN.—We now offer in evidence a certified copy of this plat.

Mr. HELLENTHAL.—We object to the introduction of this plat. I will ask the witness a few questions.

(By Mr. HELLENTHAL.)

Q. When was this survey of the Forrest made?

A. 1900.

Mr. HELLENTHAL.—Any survey that Mr. Hill might have made in 1900 could in no wise affect the location of the Lotta claim or in anywise establish the location of the Lotta claim or any other matter in controversy.

Objection overruled. Defendant allowed an exception.

The plat is marked Plaintiff's Exhibit "O" and

(Testimony of Lloyd G. Hill.)

admitted in evidence.

Q. Now, in making that survey for the Forrest lode claim made in 1900, who was making the survey with you? A. I was assisting Mr. Garside.

Q. The same George W. Garside that made the survey of the Lotta? A. Yes, sir.

Q. And helped on the Parish? A. Yes, sir.

Q. I will ask you if you found that the Forrest lode claim overlapped the Lotta claim in the manner and form indicated on this plat, the plat just offered in evidence. [223]

Mr. HELLENTHAL.—Objected to as incompetent, irrelevant and immaterial.

Objection sustained. Plaintiff allowed an exception.

Q. The map and plat that we have offered in evidence there correctly shows that survey as it is made upon the ground, does it? (Referring to Exhibit "O.") A. I think so, yes, sir. * * *

Q. Have you been up and down the Basin road a great deal? A. A great deal; yes, sir.

Q. About how many claims were you and Garside interested in making surveys of up there since 1900, approximately?

A. About twenty or thirty claims, perhaps.

Q. You surveyed all of the Dora group, did you?

A. Yes, sir.

Q. What about the Perseverance?

A. Yes, sir, all the Perseverance.

Q. And have you done some surveying also of contiguous property, adjacent property, belonging to the

(Testimony of Lloyd G. Hill.)

Alaska-Juneau Co., the defendant in this case?

A. Yes, sir.

Q. Now, this stake that you have spoken about. Where is it located with reference to the Basin road?

A. Located right southeast of the Basin road, the edge of the Basin road, I might say, right at the Basin road, beginning at the little bridge.

Q. I will hand you Defendant's Exhibit "I" and ask you if you have seen that photograph before.

A. I think this is the first time I have ever seen it.

Q. Did you hear the testimony of Mr. Ebner and Mr. Pond in identifying that stake?

A. Yes, sir, I did. [224]

Q. Now, there seems to be some wood or timber there around the stake—what is that? Is there a bridge there on the road?

A. That is the end of the bridge.

Q. No, the road.

A. On the Basin road, yes, sir.

Q. How long has that bridge been there?

A. The bridge has been there—I knew it in 1898, and I guess before that.

Q. It has been there since the building of the road?

A. Yes, I think so.

Q. This stake when it was located in the survey of the Forrest lode claim, where was it put with reference to where it is at the present time?

A. Same place.

Q. Now, you say that you were again on this property— I will withdraw that—

Q. Were you on this property in 1908?

(Testimony of Lloyd G. Hill.)

A. Yes, I was on the property again in 1908.

Q. At whose request and for what purpose did you go on there?

A. I went on there to assist in the survey of the Parish #2 lode at the request of Mr. Ebner.

Q. Who else was with you then?

A. Mr. Wettrick and Mr. Tripp and Mr. Ebner and one or two other men. I am not certain who they were.

Q. Well, were you on any portion of the Lotta lode claim then?

A. Yes, sir, we were on the same line, 5-6.

Q. On the lower side line of the Lotta?

A. Yes, sir, on the Lotta.

Q. What was done along there by Mr. Ebner and these people that were with you and yourself?

A. The line was brushed out and merely used as a backsight, [225] that is all, as a backsight, to commence the survey of the Parish #2 claim.

Q. I will ask you if on this lower side line of the Lotta, you saw any stakes there?

* * * * *

Q. Now, in 1908, then, when you made this survey of the Parish lode claim, just state to the Court what you did and what lines you ran out and what stakes, if any, you found on the Parish lode claim #2.

A. I didn't make the survey line; Mr. Wettrick was with me—we made it together. We took as our starting-point post #5 of the Lotta and prolonged the line 5-6 of the Lotta in a southeasterly direction to the southeast corner of the Parish #2 claim and

(Testimony of Lloyd G. Hill.)

found a stake there. We then turned 90° from that line to the left and run the end line of the Parish #2, the southeast end line of the Parish #2, a distance of 600 feet and also found a stake at the southwest corner of the Parish #2. We then turned and run parallel with the side line of the Lotta a distance of 1500 feet to the northeast corner of the Parish #2, and then run in a northeasterly direction 600 feet to the northeast corner of the Parish #2, and that brings us back on the line 5-6 of the Lotta claim.

Q. (By the COURT.) You said at the first turning you turned to the left?

A. Yes, sir, we turned to the left, facing the back line.

Q. That is, you commenced somewhere up here (indicating)?

A. No, I commenced down at this corner, Corner #5 of the Lotta.

Q. What do you call the back line? [226]

A. Well, I call that line 5-6 of the Lotta.

Q. What condition was this side line between the Lotta and the Parish in at that time?

A. It was very well defined—the brush was cut out—some small brush had grown up but you could retrace the line easily.

Q. Now, Mr. Hill, I will ask you if you had anything to do with the survey of the Royal lode claim survey #238?

A. No, sir, I didn't have anything to do with that.

Q. Do you know who made it?

A. George W. Garside, I think.

(Testimony of Lloyd G. Hill.)

Q. That is one of the claims that belongs to the defendant company, the Alaska-Juneau.

A. I don't know whether it does or not.

Q. I will ask you, Mr. Hill, if you are acquainted with the field-notes as they exist in the Surveyor-general's office, the official field-notes for the survey of the Royal lode claim—have you looked them over?

A. I have; yes, sir.

Q. I will ask you if in those official field-notes of the survey of the Royal lode, if you found any ties made to any of the corners of the Lotta claim?

* * * * *

Q. You said you made a survey of the Colorado lode claim? A. I have—I did, yes, sir.

Judge WINN.—At this time we desire to offer in evidence the complaint in Case #430-A of this court, The Ebner Gold Mining Company, plaintiff, versus The Alaska Juneau Gold Mining Company. We desire to offer the complaint in that suit in evidence for the purpose indicated this morning, to show that this defendant company has always recognized [227] the Ebner Gold Mining Company as a corporation, and for the further purpose to show that when there was a survey of the Colorado lode claim for the defendant company, it was found to conflict with the Parish #1 claim, and this is an adverse suit that grew out of an adverse that was filed by the Ebner Gold Mining Company in the Land Office, claiming that part of the Parish lode claim which is marked on this map and plat in heavy lines, and that the defendant company recognized the

(Testimony of Lloyd G. Hill.)

right of the Ebner Company and made an agreement that if they allowed the Royal to go to patent, they would deed the conflicting part to the Ebner Gold Mining Company, and that was the settlement of this suit—and they did deed this piece of property to the Ebner Company. It will serve the purpose of three or four matters in this case: In the first place it is the recognition by this company of the assessment work that had been kept up on the Parish #1 claim at that time—it was a valid existing claim, etc.

* * *

By the COURT.—The offer to show any admissions concerning title—I think it is against the policy of the law to allow compromises to be shown for that purpose. As to the rest of the offer, if you have any objection to make to it I will hear you.

Mr. HELLENTHAL.—It is a complaint in a suit brought by the Ebner Company, in which they are plaintiff, and it is a self-serving declaration.

Judge WINN.—We are going to follow it up and show they absolutely gave us a deed to it and gave a deed to the Ebner Gold Mining Company.

By the COURT.—Any stipulation or written agreement recognizing the company will be admitted for that purpose * * * as recognizing [228] the Ebner Gold Mining Company as a corporation. If there is some writing that did that, you may offer it for that purpose showing it was a *de facto* corporation and recognized by the defendant. So far as being admitted to recognize title in the Parish #1 and the compromise of the litigation, I don't think

(Testimony of Lloyd G. Hill.)

it is admissible for that purpose. The objection to the complaint will be sustained at this time.

Plaintiff is allowed an exception to the ruling of the Court.

Q. We stopped, I believe, in the year 1908—have you been upon the Lotta lode claim and the Parish #2 lode claim since 1908? A. Yes, sir, I have.

Q. When were you on those claims since that date?

A. I was on them in 1910.

Q. For what purpose did you go on then?

A. I was assisting Mr. Wettrick in the resurvey of the Parish #2.

Q. What time in 1910 were you on there?

A. I was on and around there almost continuously from August first up to the first of December of that year.

Q. Were you over at any of the side or end lines of the Lotta claim during that time?

A. I was, yes, sir, during that period.

* * * * *

Q. Mr. Hill, you know where the flume is upon the ground up there that has been constructed by the defendant company, don't you?

A. The high line flume?

Q. The flume-line that has been constructed by the defendant company—they haven't but one flume-line up there, have they? [229]

A. Yes, sir, I know where that is.

Q. Have you surveyed off that flume-line?

A. I assisted on the survey of it; yes, sir.

Q. You and Mr. Wettrick? A. Wettrick and I.

(Testimony of Lloyd G. Hill.)

Q. Did you see the defendant company's flume-line on the ground? A. Yes, sir.

Q. Do you know how it is constructed?

A. Yes, sir.

Q. And surveyed it? A. Yes, sir.

Q. And know where the dam is on the ground?

A. I do.

Q. Now, I will ask you where that dam is with respect to the common side line of the Lotta and the Parish #2 lode claim?

A. The major portion of the dam is entirely within the boundaries of the Lotta lode claim.

Q. And is any part of the flume constructed on the Lotta lode claim? A. No, sir.

Q. What claim does this flume extend over that is on this exhibit "N"?

A. The flume extends across the Parish #2 lode.

Q. Across the entire width of it?

A. Across the entire width of it.

Q. As indicated on this map and plat?

A. Yes, sir.

Q. I will ask you if this map and plat in its entirety is made by actual surveys made on the ground and information and records you found in the surveyor-general's office? [230]

A. It is, yes, sir.

Q. What information and data did you use in making this exhibit?

A. Surveys were made by Mr. Wettrick and me, surveys by him and I on the ground and from the official notes of the various patent surveys in the sur-

(Testimony of Lloyd G. Hill.)

veyor general's office.

Q. Then, as I understand you, this survey is made as the claims appear absolutely on the ground, by actual survey, monuments, etc.? A. Yes, sir.

Mr. HELLENTHAL.—We object to that as leading.

Objection sustained.

Q. How is this map and plat made with reference to your actual survey and monuments, etc., and the data you have just spoken of?

A. It is made in accordance with the monuments on the ground and notes that we took from the surveyor general's office.

Q. This word "compressor," apparently a building marked somewhere about the center of the Lotta lode claim on the creek, what is that?

A. That is the foundation and covering for a twenty-stamp mill, I think, and compressor.

Mr. HELLENTHAL.—How is that?

A. It is the foundation and covering for a twenty-stamp mill and also an air-compressor.

Q. It is on the Lotta? A. Lotta, yes, sir.

Q. Is that the Ebner mill?

A. That is what they call the new Ebner mill; yes, sir.

Q. A foundation? A. Yes, sir. [231]

Q. There is no mill building there?

A. No, sir.

Q. Now, the Ebner mill you have been testifying concerning and the 15-stamp mill that is on the property, is that what is marked Ebner mill on the Taku

(Testimony of Lloyd G. Hill.)

lode survey 88? A. 88; yes, sir.

Q. And what is that marked "boarding-house"?

A. That is the bunk-house or boarding-house of the Ebner Company on the Taku lode.

Q. What have you marked up here as the Ebner dam—what is that?

A. That is the original of the Ebner dam and the intake on the Golden Fleece claim.

Q. How is the wagon road going up that creek indicated, going up Gold Creek,—how is it indicated on this map?

A. The wagon road running up Gold Creek is indicated with a heavy black line marked "road."

Q. What is the other object you marked just above that heavy black line called "flume"?

A. That is the high line flume of the California-Nevada Copper Company and marked in blue.

Q. Who surveyed the line of that flume?

A. Wettrick and myself.

Q. Approximately, Mr. Hill, or get it exactly if you can, how many feet of the defendant company's flume, is crossing the Parish #2 lode claim?

A. It would be approximately 800 to 850 feet.

Q. I see you have marked across the Parish lode claim a wagon road,—what wagon road is that,—is that the regular traveled wagon road going to the Perseverance Company's mine?

A. Yes, sir, the Silver Bow Basin road, the wagon road.

Q. Crossing what claim? [232]

A. Crossing the Parish #2.

(Testimony of Lloyd G. Hill.)

Q. What is the word "flume" indicated down here about south of the centre line of the Parish lode claim?

A. That represents the flume constructed by the Alaska-Juneau Company on the east side of Gold Creek.

Q. Do you know anything about a tunnel on the Parish lode claim, somewhere down near the creek level, just about—I don't remember whether it is just on a level with the defendant company's flume or not, but right near their flume line—do you know anything about a tunnel there?

A. Owned by whom?

Q. Well, were you in court when Mr. Ebner testified this morning? A. No, sir, I was not here.

Q. How many tunnels do you know of being on the Parish lode claim? A. I know of four.

By the COURT.—Which Parish?

Q. Parish #2. Do you know of a tunnel down near the level of the flume line of the defendant company? A. Yes, I do.

Q. Here is a photograph marked Plaintiff's Exhibit "M." I will ask you if this tunnel you spoke of as being down below the flume-line,—if you can see it indicated in that photograph?

A. I can, yes, sir.

Q. Have you ever mentioned the length of that tunnel? A. Yes, sir.

Q. Mr. Ebner didn't know the length of it this morning—do you know the length of it?

A. 32 feet, 5 by 7 feet and 32 feet long under cover.

(Testimony of Lloyd G. Hill.)

Q. I have here now from the surveyor general's office the official field-notes in Surveys #237, 238 and 239—one of these claims which is indicated as 238 is the Royal lode claim as indicated on this Exhibit "N." Now, I will ask you to take these field-notes and go over them and see whether or not there is any tie from any natural object on the Royal lode claim to any one of the stakes of the Lotta lode claim.

Mr. HELLENTHAL.—We object to this testimony, in the first place, because it is hearsay—it depends for its truth or falsity on something other than evidence; and in the second place, because it cannot be offered as an admission because the notes were not made by any party to this record, nor was the party who made the notes in anywise connected with any part of the record, etc.

After argument the objection was by the Court overruled. Defendant allowed an exception to the ruling.

A. Yes, sir, there is; the tie is given on these notes.

Mr. HELLENTHAL.—When was the Royal survey made? What is the date of those notes you have there in your hand? A. There is no date on them.

Mr. HELLENTHAL.—I object to it, further, on the ground that it is not the best evidence—they show for themselves.

The WITNESS.—August, 1891.

By the COURT.—The Court will not undertake to take an original document out of the surveyor general's office; it may be read into the record.

The WITNESS.—August, 1891, and the bearing is given here.

(Testimony of Lloyd G. Hill.)

Mr. HELLENTHAL.—I call to the Court's attention the fact that that is simply some notes subsequent to the patenting of the Lotta,—I don't think that was in the record when I made [234] the former objection, and I make the same objection with that addition.

Objection overruled. Defendant allowed an exception.

The WITNESS.—Beginning at Post marked #1, U. S. Survey #238, identical with post #3 and 5, Lots #87 and 88, respectively, at notice of location; whence mouth of tunnel 200 feet long, ten feet wide and eight feet high trending east bears south 29° east 120 feet distant.

By the COURT.—That portion of the field-notes will be admitted in evidence that the field-notes may be withdrawn until such time as the surveyor general's office can furnish a certified copy of that portion.

Q. Now, I will ask you if you have ever been upon the ground of the Royal lode claim and found this tunnel that you have referred to in the field-notes that you have just read? A. I have, yes, sir.

Q. I will ask you if you took the bearing, the courses and distances of that from the corner post of the Lotta stake as you have been testifying concerning and as it is upon the ground—have you done that? A. Yes, sir.

Q. Just state to the Court what you found in that regard.

A. Well, I found that it did not come out as the

(Testimony of Lloyd G. Hill.)

notes in the patent called for quite,—the difference is 12 feet in length and the difference in the course is about 7°.

By the COURT.—What did you find it on the ground, the length? A. 120 feet on the ground.

Q. That would throw it, of course, further down the hill and take off some of the end of the Lotta claim?

A. It is very indefinite, the mouth of the tunnel, rather [235] indefinite to get at exactly where it might have been measured before as a tunnel caves from year to year. You might measure where you break ground or you might take it under the roof of the tunnel—that would make a difference.

Q. So you only found this difference you testified to from an actual survey made from some point you took as the mouth of the tunnel?

A. Yes, sir; which the former surveyor may not have taken.

By the COURT.—But from the point you took as the mouth of the tunnel the call was over ten feet short—the call would pull the claim up the creek from what you claim it is?

A. Yes, sir; it wouldn't pull the claim up the creek; it would throw the claim to the northwest twelve feet.

By the COURT.—It would pull it part of that distance up the creek?

A. Yes, a very small part of that distance.

Q. I will ask you—this stake you spoke of and the corner post from which you took those courses and

(Testimony of Lloyd G. Hill.)

distances from the mouth of what you found to be an old tunnel up there—I will ask you if that place up there is subject to snow slides or not—how is that ground up there?

A. Very steep ground up there. This is an angle of 35°, I expect, from the horizontal.

Q. Now, I have the official field-notes here, Mr. Hill, of the United States Survey #545, which includes a group of claims I think you have referred to as the Dora group, one of which is the Forrest you have testified you assisted George Garside to survey in 1900. I wish you would take these field-notes and just read off to the Court just what the conflict was between the survey that was made of the Forrest [236] at that time and the Lotta.

Mr. HELLENTHAL.—When was that survey made?

A. In 1900.

Mr. HELLENTHAL.—We object to the question as incompetent, irrelevant and immaterial. The question as to what conflict Mr. Hill found is a question for the Court. He can only testify what he found on the ground at that time.

Objection overruled. Defendant allowed an exception.

A. You want a description of the conflict?

Q. Yes.

A. I will read the notes. It is south 1-30 west 122 feet; north 69-25 west 121 feet; south 33-45 east 198 feet, containing an area of .1594 acres.

Mr. SHACKLEFORD.—It is understood that the

(Testimony of Lloyd G. Hill.)

portion of the official field-notes of mineral survey 545 may be substituted by a certified copy from the surveyor general's office.

Judge WINN.—That portion which we read into the record.

Mr. SHACKLEFORD.—Subject to such objections as we may offer to the evidence given in connection with it.

By the COURT.—It will be so ordered, with the understanding that the same objections you have already made will be made to the certified copy.

Mr. HELLENTHAL.—Mr. Hill, that .1594 acres—that is the area of the claim?

A. That is the area of the conflict,—.1594 acres.

Q. I don't believe I asked you about running off the lines of the Parish #2 lode claim—I don't believe I asked you anything about how you surveyed it off on the ground?

A. Yes, I think I answered that—the Parish #2.
[237]

Q. Well, is this map, so far as the survey of the Parish #2 is concerned, made according to the survey of it that you made upon the ground? I am referring now to Exhibit "N." A. Yes, sir.

* * * * *

Judge WINN.—That is all at this time.

Cross-examination.

(By Mr. HELLENTHAL.)

* * * * *

Q. Mr. Hill, you also made the survey of the Oregon lode at the time it was located by Mr. Corbus?

(Testimony of Lloyd G. Hill.)

Judge WINN.—We object as not proper cross-examination.

Objection overruled. Plaintiff allowed an exception.

Q. You surveyed the lines of the Oregon at the time Mr. Corbus located it?

Judge WINN.—Which one of the Oregons do you mean?

Q. I mean the Oregon that was located in 1899—you remember that? A. Yes, I remember it.

Q. And you helped to locate those stakes, didn't you?

Judge WINN.—You will allow me an exception to all this testimony?

The COURT.—Yes, sir.

A. Yes, Mr. Garside and I went up there and set the stakes of the Oregon.

Q. At the four corners?

A. Set the notice and put up the corners.

Q. Those stakes were set up in accordance with the description given in the notice?

A. To the best of my belief, yes, sir. [238]

Q. And you ran the lines of the Oregon as described in the location notice as located by Mr. Corbus? A. Yes, sir.

Q. I have a copy here of the Oregon notice—it is a copy of a certified copy. It is not a certified copy by the Commissioner but the Commissioner made a certified copy and this is a copy. Here is the original in the book—I wish you would mark that paper, Mr. Reporter, Defendants' Exhibit #4 for Identification.

(Testimony of Lloyd G. Hill.)

(It is so marked.)

(Mr. Shackelford reads the original from the book and Judge Winn checked the copy.)

Q. Mr. Hill, you say you ran the lines and set the stakes on the Oregon claim as located in 1899?

A. I assisted Mr. Garside in the work; yes, sir.

Q. You didn't know at that time that there was any Parish claim on the ground? A. No, sir.

Q. Had you known that or had any evidence of it, you would have informed Mr. Corbus about it?

A. Yes, sir, I should have.

Q. You had not consulted the records, I don't suppose? A. No, sir.

Q. And there was nothing to indicate to you that there was another location on the ground?

A. I didn't see any stakes.

Q. You didn't know, had no intimation, that anybody else claimed the ground?

A. Well, I may have had that because the ground had been located on and off, Mr. Garside informed me, but from time to time it lapsed and had been relocated like many other [239] claims in this vicinity.

Q. Now, you knew at that time where the southerly line of the Lotta was? A. Yes, I did.

Q. I hand you here Defendant's Identification #4, which purports to be a copy of the notice of location of the Oregon, and ask you to look at it and see if that ties to the Lotta side line?

A. It does, yes, sir.

Q. Now, I will ask you to state—read that notice

(Testimony of Lloyd G. Hill.)

over, read those notes, and see if the tie there given corresponds with your map exhibit "N"?

A. Well, of course, it would be pretty hard for me to fix this Oregon location notice to my claims, because the Oregon location is not on that map.

Q. You know, however, where the Last Chance corners are on your map—are they on your map?

A. Yes, sir, the Last Chance corners are on my map.

Q. You can easily measure from the Last Chance corners to the southerly side line of the Lotta?

A. Yes, sir.

Q. Along the course given in that notice?

A. Approximately, yes, sir.

Q. Have you a scale? A. Yes, sir.

Q. Take your scale and measure that course and see how much it will be?

Judge WINN.—This all goes in subject to my objection that it is improper cross-examination and immaterial and my exception?

The COURT.—Yes, sir. [240]

A. That would be approximately 1400 feet. That, of course, is dependent upon the course, the more the course is tipped to the east the shorter that line necessarily would be in intersecting the Lotta side line.

* * * * *

Q. You remember surveying the Parish lode claim for Mr. Ebner?

A. I remember assisting on the Parish lode in 1908; yes, sir.

(Testimony of Lloyd G. Hill.)

Q. I mean the Parish #2? A. Yes, sir.

Q. Did you find any stakes there at the time?

A. I did, yes, sir.

Q. How many stakes? A. Four stakes.

Q. All in place? A. All in place, yes, sir.

Q. Large or small?

A. I think they were four inches square.

Q. Did they check up pretty well with the survey? A. Yes, sir.

Q. How near?

A. Very close—within a few feet.

Q. Now, Mr. Hill, is it not a fact that your Exhibit “H” merely lays out the Lotta with reference to those stakes, without regarding any course or distance or anything else—just measure from the stakes that you find on the ground there and locate the parallelograms—isn’t that true? A. No, sir.

Q. What else did you do there? * * *

Q. Now, I call your attention to a map marked for identification [241] Defendant’s Exhibit #6 and ask you to look at that map and see if that creek is on there about right.

Judge WINN.—We object to that as not proper cross-examination.

Objection overruled. Plaintiff allowed an exception.

A. I would not be at all in a position to say so, Mr. Hellenthal, until I had been able to expert that map—you can’t tell a thing by looking at it.

Q. Anyhow you will note there a parallelogram, or approximately a parallelogram, drawn in black ink,

(Testimony of Lloyd G. Hill.)

don't you? A. I do.

Q. Mark the west side line of the Lotta, one of the side lines claimed by the Ebner Company; do you note that? A. Yes, sir, I do.

Q. That parallelogram, assuming that the stakes are in the ground as you do on making your Exhibit "N," would be about right, wouldn't it?

Judge WINN.—We object to that as incompetent, irrelevant and immaterial, no foundation laid for the introduction of this map, no evidence of its correctness and not proper cross-examination.

Objection overruled. Plaintiff allowed an exception.

A. I absolutely refuse to certify to the correctness of this map at the present time.

Q. You don't know whether it would be right or not? A. No.

Q. Now, Mr. Hill, assuming that the creek is in the right position on that map,—I will now call your attention to a parallelogram appearing on this map drawn in red ink—do you notice that?

A. Yes, sir. [242]

Q. I will call your attention to that parallelogram and I will ask you to state to the Court—examine this parallelogram carefully, examine the courses and distances given in the patent and field-notes, examine the ties to the creek given in the patent field-notes, being 1200 feet from the southerly side line and forty feet on the upper side line, and I will ask you, in observing those courses and distances and those ties to the creek, if there is any possible place

(Testimony of Lloyd G. Hill.)

that you can lay that claim except the place where it now lies as indicated by the red line—and to assist you I will hand you a piece of cardboard drawn the size of the parallelogram and a scale.

Judge WINN.—I object to that.

By the COURT.—If the witness feels he can answer the question, he may take the time to do so.

A. I wouldn't care to attempt it here in the courtroom—it is hardly fair to a man working here; you can't work the way you can in your office.

Q. If you had all the instruments you might be able to tell if there was any place you could lay that parallelogram?

A. I don't know the relative position—it can swing; you can move it anywhere you wanted—it is tied to nothing.

Q. We assume that that creek is on the plat correctly? A. Yes, sir.

Q. Now, you have the ties in the patent?

A. Yes, sir.

Q. The courses and distances in the patent?

A. Yes, sir.

Q. Now, I am asking you to put that claim on that paper in any [243] shape that you can put it, other than the shape it is in, and observe those courses and distances and those ties to the creek. I don't care where you put it—put it anywhere. Let us see how you do it.

Objected to.

By the COURT.—If the counsel wants to submit the map to the witness and have him return to the

(Testimony of Lloyd G. Hill.)

stand to-morrow morning at ten o'clock to answer the question, he may do so, but to take the time in the courtroom to enter into a mathematical calculation would consume too much time.

Mr. HELLENTHAL.—I will do so. The witness may take the map and answer the question to-morrow morning.

Another map is marked for identification Defendant's Exhibit #7.

Q. I now call your attention to the chart marked for identification Defendant's Exhibit #7 and ask you to look at it—I call your attention to stake #5 of the Colorado claim—do you see where that is there? A. No, sir, I don't see it.

Q. Do you see that corner where the stake ought to be? A. It is not marked.

Q. You know where the corner is?

A. I don't know where it is on this map; no, sir. I didn't make this map—I just sat here and looked at it.

Q. You can tell by examining that map?

A. You can't tell those things in our profession.

Q. Can't you tell where the northwesterly corner of the Colorado is?

Judge WINN.—We object to that—there is no tie; there is a lot of random claims on the map, without tying them to any group [244] of claims or any monument, and is unfair to the witness.

Objection overruled. Plaintiff allowed an exception.

Q. You know which is north?

(Testimony of Lloyd G. Hill.)

A. Yes, I know what is north.

Q. You can tell which is the northwest corner?

A. I presume the northwesterly corner is over here, of the Colorado.

Mr. BURTON.—You mean the northwest corner of the claim you have marked on that map as the Colorado?

Mr. HELLENTHAL.—Exactly.

Q. That is Corner #5, isn't it?

Same objection. Objection overruled. Plaintiff allowed an exception.

Q. The northwesterly corner of the Colorado, that is Corner #5? A. Yes, sir, I think so.

Q. Corner #4 is the northeasterly corner?

Judge WINN.—You mean as drawn on this map?

Mr. HELLENTHAL.—Yes, sir.

A. No, sir, no—corner #4 is the southwesterly corner.

Q. What is the northeasterly corner?

A. The northeasterly corner is corner #6.

Q. Just take your pencil and mark the number of those corners on there, will you?

Same objection. Objection overruled. Plaintiff allowed an exception.

A. This is 5, purports to be, and this is 6.

Q. Now, Mr. Hill, have you got a scale?

A. I have.

Q. Would you run the number of feet along the line indicated here on the ground 1474.11 feet according to the course [245] given in the patent, and see if you arrive at the point given or indicated on

(Testimony of F. J. Wettrick.)

this identification. Just put a naught there in pencil, will you? Indicate it by a naught, by a round circle—see if you arrive there, will you? See if that is right?

Objected to as not proper cross-examination.

Judge WINN.—If Mr. Hellenthal will indicate some object in this—

Mr. HELLENTHAL.—We are trying to locate the Lotta—that is the object.

* * * * *

(Balance of testimony regarding Lotta.)

Witness excused. [246]

[Testimony of F. J. Wettrick, for Plaintiff.]

F. J. WETTRICK, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Judge WINN.)

Q. How long have you been living in Alaska?

A. About four and a half or five years.

Q. What is your business, trade or profession?

A. That of a civil engineer, United States deputy mineral and land surveyor.

Q. You hold such an appointment here in Alaska now? A. I do.

Q. Are you acquainted with any of the property known as the Ebner group of mines? A. I am.

Q. Located up Gold Creek? A. Yes, sir.

Q. Are you acquainted with one of the claims in that group known as the Lotta?

A. I am. * * *

(Testimony of F. J. Wettrick.)

Q. When were you first upon the ground there for the purpose of making any survey or running out any lines? A. 1908.

Q. At whose request did you go upon this property? A. At the request of Mr. Ebner.

Q. Who else was in company with you, if any one?

A. Mr. Ebner, Tripp, Mr. Hill, with two axmen, I believe—an axman or two.

Q. Now, referring to Exhibit “N” of the plaintiff in this case, I will ask you to state which one of those claims you had anything to do with in surveying at that time?

A. The Parish #1 and 2 and then some additional lines in red— [247] as far as claims are concerned, the Parish #1 and 2 are the only claims. I want to qualify that—I surveyed also a portion of the lines of the Cape Horn and Cape Horn #2 further down on the creek, not shown on the plat.

Q. Were you on any of the end or side lines of the Lotta? A. I was.

Q. What lines, if any, were you on?

A. On the southwesterly side line of the Lotta and the southerly end line of the Lotta at that time.

Q. What were you doing there?

A. I went there for the purpose of locating the corners of the claims mentioned and getting a starting point for the running out and relocating or re-surveying of the lines of the Parish #1 and 2.

Q. Parish Number 1 and 2, both? A. Yes, sir.

Q. Now, I will ask you to state what, if any, corners, posts, stakes or monuments you found upon

(Testimony of F. J. Wettrick.)

any of the lines of the Lotta lode claim?

* * * * *

Q. Now, what, if anything, did you do as regards running out any of the lines of the Parish lode #2 at that time?

A. Having gotten my bearing as the bearing of the westerly side line of the Lotta, I ran in a southeasterly direction 124.2 feet, about 125 feet, and I found there a post 5x5 two feet above ground.

Q. What else?

A. And I turned from that point at right angles for my backsight and ran 600 feet in a southwesterly direction—the course is parallel to the end line of the Lotta claim, the [248] point from which I staked and found a post at the other end of that end line. From there I turned and ran across the southwesterly end line, turned at right angles and continued up this line of the Parish. I also ran up in that direction, that is, in a southeasterly direction on the side line of the Royal claim some distance and over the old slashing, and we rebrushed the line.

Q. Is that also an end line of any other claim?

A. That is the end line of the Colorado claim.

Q. What about the Parish?

A. It is a side line of the Parish #1 claim, being identical with the southwesterly side line of the Royal.

Q. Is that last line you have just mentioned an extension of the lower side line of the Lotta claim?

A. Yes, sir, the same course.

Judge WINN.—I desire at this time to offer in

evidence the contract that exists between this company, the defendant company, and the Ebner Gold Mining Co., for the conveyance to the Ebner Company of the part that was in conflict with the Parish #1 and the Colorado claim, and I desire also to follow up that contract, which was an agreement to convey the conflict with the Ebner Company with a deed. I do it for several reasons. * * * The first reason is they showed they recognized the Parish #1 lode claim as an existing claim, * * * and furthermore to show that this company, this defendant company, has always recognized the defendant company as a corporation and dealt with it, etc. We also offer the notice of location of the Parish #1—it ties up to the Lotta.

Mr. SHACKLEFORD.—We object to this offer. It is apparent [249] from the papers, from the exhibit offered, that it is a matter of compromise of a lawsuit then pending between the parties, that was brought by the Ebner Gold Mining Co.

Judge WINN.—It was not a compromise—they gave us everything we asked.

Mr. SHACKLEFORD.—It is objectionable on that ground, and the further objection, if it is offered to prove the Ebner Company is a corporation in fact, the transactions between the parties is in no way binding upon the defendant company. And further, it does not tie the Lotta claim in any way and refers to a conflict between the Colorado claim as a claim that is not in dispute in this suit.

By the COURT.—It expressly appears here that

(Testimony of F. J. Wettrick.)

“in compromise and settlement of said litigation, it is hereby understood and agreed, etc.” It is against public policy to allow admissions, to contend to admissions, in compromises of litigation. The law encourages compromises of litigation out of court, but it don’t amount to anything more than a quitclaim deed as far as admissions are concerned, if it amounts to as much. Your first offer of these papers will be admitted for the purpose of showing they treated with this company as a corporation. Your second offer of the record of the location notice of the Parish #1 which ties up to the Lotta will be rejected on the ground for which it was offered.

Defendant allowed an exception to the ruling of the Court. The papers are to be entered into the record.

Adjourned until to-morrow (Friday), May 26, 1911. [250]

Friday, May 26, 1911—Morning Session.

Continuation of the direct examination of Mr. WETTRICK.

(By Judge WINN.)

Q. I believe, Mr. Wettrick, yesterday I left off after asking what you did on this property in controversy on the Lotta and Parish #2 lode claims in the year 1908. Now did you ever make any further survey of the Parish lode claim since that date?

A. Yes, sir.

Q. When was that?

A. In the year 1910, last fall.

Q. I wish you would state briefly what monuments

(Testimony of F. J. Wettrick.)

you found on the common side line between the Parish #2 lode claim and the Lotta when you made this survey in 1910 and all other monuments that you found on the Parish lode claim.

A. I found Corner # 5 on the side line common of the Parish #2 lode and the Lotta lode, also monument #3 of the Parish #2 lode, the monument at the intersection of the Forrest lode with the side line of the Parish and the Lotta; monument #4 of the Parish #2 lode, which is common to monument #1 of the Parish #1 lode.

Q. Now, I will ask you if at that time you discovered any stakes of the Forrest lode claim?

Mr. SHACKLEFORD.—We object to that on the ground that it is a subsequent survey.

Objection overruled. Defendant allowed an exception.

A. Yes, I did.

Q. Just state to the Court what you found with reference to the Forrest lode claim.

A. I found corner post #1 of the Forrest lode and also the [251] post at the intersection of the Lotta side line which is common to the Parish #2 lode side line, this intersection between the intersection of the end line of the Forrest with that common side line.

Q. Can you designate a little more particularly about what part of the Parish lode #2 you discovered the corner post #1 of the Forrest lode?

A. Yes.

Same objection. Objection sustained.

Q. Have you indicated on this map, Mr. Wettrick,

(Testimony of F. J. Wettrick.)

“N” in corner post #1 of the Forrest lode claim?

A. It is indicated.

Q. I will ask you if you have ever retraced or made a survey of the lines of the Lotta lode claim?

A. I have.

Q. When did you do that?

A. Did that in the year 1910; last fall.

* * * * *

Cross-examination.

(By Mr. HELLENTHAL.)

Q. You are the partner and business associate of Mr. Lloyd G. Hill, are you not? A. I am.

Q. That is the same Hill that testified on yesterday? A. Yes, sir.

Q. And you are collaborating with Hill in the making of these surveys? A. Yes, sir.

Q. Worked together? A. More or less.

Q. Well, you were together, both of you there at the same [252] time, is that true?

A. On the ground?

Q. Yes. A. Not always, not every day; no.

Q. You made the survey together? A. Yes, sir.

Q. There might be one absent for a while but you surveyed together? A. Yes, in the main.

Q. He testifies to your notes and you to his, is that the way of it? A. Certainly.

* * * * *

Q. You never took a college course in civil engineering? A. I did.

Q. Where?

A. I took the course at Valparaiso College and I

(Testimony of F. J. Wettrick.)

took a post-graduate course in the University of Washington.

Q. You are now the partner of Mr. Hill?

A. Yes, sir.

* * * * *

Q. In doing this surveying you were employed by the California & Nevada Company?

Judge WINN.—We object to that as incompetent, irrelevant and immaterial and improper cross-examination.

Objection overruled. Plaintiff allowed an exception.

A. In making the survey last year I was thought to be employed by the California & Nevada Copper Company.

(By Judge WINN.)

Q. Who employed you—did Mr. Ebner employ you or Mr. Bent? [253]

A. Mr. Bent last year. In 1908 when I ran over some of the ground I was employed by Mr. Ebner.

Q. We are getting you to do this work?

A. Yes, sir.

Q. We are? A. Yes, sir. * * *

Witness excused. [254]

[Testimony of John Perelle, for Plaintiff.]

JOHN PERELLE, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Judge WINN.)

Q. What is your business? A. Mining.

(Testimony of John Perelle.)

Q. How long have you lived in and about Juneau?

A. For nineteen years.

Q. Do you know William M. Ebner?

A. Yes, sir.

Q. How long have you known him?

A. Know him about the same time.

Q. About how long?

A. Nineteen years.

Q. Did you ever act as a superintendent for him up at the Ebner mines? A. Yes, sir.

Q. Do you remember what years?

A. 1900 and 1901.

Q. Do you know approximately the ground up there that they call the Parish #2 lode claim?

A. Yes, sir.

Q. I will ask you if there was any work done on that lode claim the Parish #2 in the years 1901 and 1902?

A. Yes, sir, there was a little work done there.

Q. There was work done there? A. Yes, sir.

Q. Do you remember about how many men were working over there at different times during those years? I will confine it to 1901.

Mr. SHACKLEFORD.—We object to the form of the question. We [255] want to know who the men are.

Objection overruled. Defendant allowed an exception.

Q. 1900 and 1901 were the two years you stated?

A. Yes, sir.

Q. Do you remember any men in 1901 doing any

(Testimony of John Perelle.)

work on that mining claim, Parish #2?

A. Yes, I had one man there nearly two months, steady working, and then I had several, sometimes eight or ten, some days here and there and then took them out working.

Mr. SHACKLEFORD.—We move to strike the answer and object to the testimony unless the witness goes into details.

By the COURT.—The value of it will be tested by cross-examination.

Objection overruled, motion denied. Defendant is allowed an exception.

Q. Now, in 1902 what, if anything, do you remember of men being on the Parish #2 doing any work on it? A. I was not there at that time.

Q. 1901?

A. I didn't work myself,—I had men there myself at that time. I was in charge of the work and had men working there in it. I had men to start in the mine. I put them down there to work, maybe two or three days, and took them off again and then put them on again, but I had one man steadily nearly two months.

Q. That was in 1901?

A. Yes, sir, that was in 1901, and in 1900 I was over there, too.

Q. About the same thing in 1900? A. Yes, sir.

Q. Now, I will ask you in 1908 if you did any work on the Parish #2 lode claim?

A. Yes, sir, I did—myself. [256]

Q. Did anybody help you?

(Testimony of John Perelle.)

A. Yes, I had a man helping me.

Q. Who was the man?

A. A man named Dominick Caesar.

Q. He is here in the courtroom? A. Yes, sir.

Q. Do you know how many days Caesar worked there?

A. The same as I did myself. We worked about ten days each.

Q. What kind of work did you and Dominick Caesar do on this mining claim?

A. We put in an open cut and stripped the surface and drilled some holes and blasted—whatever Mr. Ebner told me to do—shot here and there, all over the lode and put an open cut across and then ran the creek and the gulch, stripping the vein.

Judge WINN.—That is all.

Cross-examination.

(By Mr. SHACKLEFORD.)

Q. Do you see the Parish lode here?

A. Yes, sir.

Q. Now, show the Court, by reference to that map, where the work was done you did in 1900.

A. I done it right down here in the creek and all along here.

Q. Near this point marked flume?

A. Yes, from the flume, where the flume is now built.

Q. Where is the other spot?

A. And further up, all along, done some work all over.

Q. All along over the surface? A. Yes, sir.

(Testimony of John Perelle.)

Q. Did you have any special instructions as to the development of any particular ore body or ore showing on that ground [257] when you went there?

A. Yes, sir.

Q. What particular spot of quartz were you driving for or trying to uncover—what was pointed out to you as the spot you were to work for?

A. Mr. Ebner told me to put two men there driving ahead and that is all I know about it.

Q. You don't know what the object of the work was? A. No.

Q. You just put two men on there to work, to do the assessment work?

A. Mr. Ebner gave me instructions to do the work and I did what he told me.

Q. You had no definite idea at the time of any particular ore body or ore showing on that claim that you were to uncover or to drive for?

A. Mr. Ebner never explained to me that much.

Q. He never explained that to you? A. No.

Q. Did you do any of that work up here in that spot marked open cut along the end line of the Parish #1 lode, the joint end line between Parish #1 and 2?

A. I can't remember exactly those things now. It was long ago, you know. I had men scattered all along from the creek way up to the cabin.

Q. Did you have anything to do with doing the assessment work on the Parish #1 in that year 1900?

A. I don't remember exactly the line.

Q. I am talking about 1900.

A. I started from the creek and worked all along

(Testimony of John Perelle.)

clear up to [258] that cabin you see there on the survey, an open cut, and drove tunnels and cut trail, etc.

Q. Above that—you know where the Parish #2 is, Parish #1 and 2—there are two claims?

A. Yes, sir.

Q. And when you did the assessment work you did it on the two claims at the same time? A. Yes, sir.

Q. Where did you do any work on the Parish #1—what work did you do to apply on the Parish #1, the upper claim?

A. We made a trail and cut and stripped it.

Q. What was the trail to?

A. All over the surface, wherever we wanted to go. My instructions were from Ebner, and I don't know what he wanted to do it for,—I did what he told me.

Q. Where was the cut made?

A. If you go there I can show you.

Q. About where?

A. I don't know exactly now. That is long ago, you know.

Q. How far from the creek?

A. I don't know just exactly.

Q. When you had those men there working, you were working on the two claims?

A. Yes, and I worked further up too.

Q. What claims were you working on further up?

A. Way up on top of the mountain, we cut trail way up there.

Q. And that is included in the work you have been testifying about?

(Testimony of John Perelle.)

A. I had one man with me there two months steady. Sometimes I had seven or eight, some days, and some days I took them off again. [259]

Q. Did you keep account of that? A. Yes, sir.

Q. Turned the books into the company, the time-books? A. Yes, sir.

Mr. SHACKLEFORD.—We would like to have the time-books.

Judge WINN.—We haven't got the time-books—the same time-books that Mr. Ebner testified the other day he didn't have.

Q. Now, you told us about sending a man up to do that work. I want you to tell what you did to develop that claim,—what that work was, how much ground you took out, and definitely what it was that you did that tended to develop the claim, so the Court can understand it?

Judge WINN.—We object to that. Objection overruled. Plaintiff allowed an exception.

A. Mr. Ebner was there every day and every day was telling me what to do—

Q. I don't care what he told you. The thing I want to know and I presume the Court wants to know is, what you did on that ground, that is, how much ground you opened up?

A. We had a tunnel there and we started in—

Q. In 1900? A. In 1900.

Q. Where was the tunnel started?

A. The tunnel was a little way above the creek.

Q. Near the creek? A. Yes, sir, near the creek.

Q. How far did you drive in there?

(Testimony of John Perelle.)

A. Just to start it.

Q. Did you get underground, that is, did you get any overhead? A. Yes, sir.

Q. How far in did you get? [260]

A. Just a few feet when I was there and then we cut the trail and blasted out the trail and rocks.

Q. Where did that trail lead to?

A. Right down to the tunnel.

Q. Where from? Show me where the trail is on the ground.

A. On top of the bank and go down to the creek. You can't go down there without making a place to walk down—we had a ladder.

Q. Did you have any trail up to the Parish #1?

A. Yes, sir.

Q. That was part of that work?

A. And an open cut—we did some open cut.

Q. Across Parish #1? A. Number 1 and 2.

Q. Where are those open cuts now—have you been on the ground recently?

A. No, I have not been on the ground.

Q. Not since 1908? A. Not since 1901.

Q. Have you testified you did work there in 1908?

A. Yes, but not the same place I did before.

Q. You didn't go up to the old place where you worked?

A. No, I just went and done the work where he told me to do it that year. He came there and showed me the place I was to work and told me what to do.

Q. Did he tell you what to do? A. Yes, sir.

Q. What did he tell you?

(Testimony of John Perelle.)

A. He told me to put in a cut across and strip the surface.

Q. Come and show me where you put that cut approximately. [261]

A. I can't show you on the map.

Q. You have been used to using maps in reference to mining.

A. There was a cut here—that must be 300 feet above the creek.

Q. How near was the tunnel you drove?

A. The tunnel was nearer to the line.

Q. What did you uncover in that cut?

A. I uncovered diurite and quartz.

Q. Now, you went up there in 1908, did you, to do some work? A. Yes, sir.

Q. Who employed you? A. Mr. Ebner.

Q. What time was that?

A. In December some time.

Q. You say you were up there in 1902?

A. 1901 and 1900.

Q. You were not up there in 1902? A. No.

Q. And you were up there in 1908?

A. Yes, sir.

Q. Mr. Ebner hired you? A. Yes, sir.

Q. What time did you go?

A. In December some time—I don't remember the date.

Q. In December? A. Yes, sir, in December.

Q. What time was it you were up there in 1900 and 1901?

A. I believe I went up there during the winter—I

(Testimony of John Perelle.)

don't know—December; something like that.

Q. In the winter? A. Yes, sir. [262]

Q. What did you do in 1908, December?

A. I did the same thing—I stripped the surface.

Q. And built a trail? A. Open cut.

Q. Did you build any trails in 1908?

A. No, sir, no trail.

Q. How much snow was there on the ground?

A. Not a bit.

Q. No snow at all? A. No, sir.

Q. December, 1908?

A. Yes, sir—there was no snow there at the time I did the work there.

Q. Where did you do the work in 1908?

A. About 300 feet from the edge of the bank, at that gulch you see there.

Q. Which side of the creek?

A. The right-hand side, going up.

Q. Is that cut there now?

A. Yes, sir, I think so; I have never been up there since, but I could see it from the road.

Q. Did you get underground at all?

A. No, we didn't try to get underground.

Q. Did you do any blasting? A. Yes, sir.

Q. You can see the cut there now if you go there?

A. I suppose so.

Q. You left a big enough hole so you could probably see it?

A. I haven't been up there since, but I could see it from the road going up the Basin. I could see the cut there.

(Testimony of John Perelle.)

Q. In 1901, was there any snow up there then, when you did this [263] other work in 1901?

A. At the time I done the work—no, there was no snow.

Q. You said you were up there in December?

A. Yes, sir.

Q. No snow in December, 1901?

A. No, it was an open winter—there was no snow.

Q. The winter of 1900 was the winter when the Topeka was wrecked, early in December, on Sullivan Island, wasn't it? A. I don't know.

Q. Don't you know that the winter of 1900 was one of the hardest, heaviest and most covered winters, so far as snow was concerned, we have ever had here?

A. Well, I don't know anything about it, but I know there was no snow there.

Witness excused. [264]

[Testimony of Dominick Caesar, for Plaintiff.]

DOMINICK CAESAR, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Judge WINN.)

Q. You know John Perelle, who just testified in this case? A. Yes, sir.

Q. Are you the man that was up there with Perelle in 1908? A. Yes.

Q. Doing some work for Mr. Ebner? A. Yes.

Q. How many days did you work with Johnny up there? A. Ten days.

(Testimony of Dominick Caesar.)

Q. What were you and Johnny doing?

A. Well, we were doing some open cut there and cutting square the surface there?

Q. You did some open cut? A. Yes, sir.

Q. And squared the surface? A. Yes, sir.

Q. You didn't make any agreement with Mr. Ebner?

A. I didn't make any agreement with Mr. Ebner, no. Johnny Perelle got charge of that and I went up with him.

Q. And you worked at the same place Johnny was working? A. Yes, sir.

Judge WINN.—That is all.

Cross-examination.

(By Mr. SHACKLEFORD.)

Q. What time was this? A. December, 1908.

Q. What time in December?

A. I don't remember the date.

Q. 1908? [265] A. 1908, yes.

Q. Did you find anybody else up there doing assessment work on claims around there?

A. Not where we were working—not in that place.

Q. Do you know anybody that was doing assessment work around there at that time?

A. No, I don't know anything about that.

Q. Have nice weather while you were there?

A. Yes, had pretty fine weather.

Q. It wasn't bad weather? A. No.

Q. No ice or snow?

A. No, there was no snow at all.

Q. No ice—was the creek frozen?

(Testimony of Dominick Caesar.)

A. No, the creek was not quite frozen. It was sloppy, but it was not froze.

Q. What did you take with you when you went up there? A. Got \$3.50 a day.

Q. What did you take with you went you went up there?

A. We went up to Mr. Ebner's place and took the tools up.

Q. What tools did you take?

A. Pick and shovel and drill-hammer, drill and hammer.

Q. How many feet did you make with that drill and hammer? A. I don't remember exactly.

Q. (By Judge WINN.) You went ten full days, did you? A. Yes, ten full days.

Witness excused. [266]

[Testimony of Oscar Harri, for Plaintiff.]

OSCAR HARRI, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Judge WINN.)

Q. Your name is Oscar Harri? A. Yes, sir.

Q. You are a native of what country?

A. Finland.

Q. Do you know Mr. Ebner here?

A. Yes, sir.

Q. How long have you known him?

A. Since 1893-1903, I mean.

Q. You know where the Ebner mill is up there on Gold Creek too, don't you? A. Yes, sir.

(Testimony of Oscar Harri.)

Q. You have been in the employ of Mr. Ebner or the Ebner Gold Mining Company up there at that mill quite a little bit, haven't you?

A. Since 1903.

Q. What were you doing, if anything, up there at the mill in 1903, 1904 and 1905?

A. In 1903 I was working in the mine; in 1904 I was running the compressor and in 1905 I was on the compressor, and in 1906—

Q. The mill closed down in the latter part of 1906 or the first part of 1907, didn't it? A. Yes, sir.

Q. Now, I will ask you if you know where the Parish lode claim is up there, the ground they call the Parish lode claim. A. Yes, sir.

Q. I will ask you if in 1907 you did any assessment work up there for Mr. Ebner or the Ebner Gold Mining Company? [267] A. Yes, I did.

Q. Just state in your own way, and take it slow, and tell the Court what work you did on the Parish lode claim #2 in 1907.

A. In 1907 I went there and built a ditch from the Snowslide Gulch and have water running through that ditch—

Q. You got water out of a dam up there at Snowslide Gulch? A. Yes, up at Snowslide Gulch.

Q. And you took it down out of the dam—how far did you run it? Did you run it through a tunnel or flume or was it a ditch? A. A ditch.

Q. What did you do with that water, what was it for?

A. I was using it to sluice the dirt from that big

(Testimony of Oscar Harri.)

pit—what they call the Borean pit.

Q. Sluicing off the gravel?

A. Sluicing off the gravel.

Q. What were you doing that for?

A. To discover the bedrock.

Q. What claim was it you were doing the sluicing on? A. I think that was on Parish #2.

Q. That is some of the work you did. What other work—did you do all sluicing, or did you do something else?

A. I was cutting the brush the same spring.

Q. Cutting the brush off the ground?

A. Around that pit, and when I built the ditch, I was cutting the brush off from that.

Q. Did you dig a ditch, did you say?

A. Yes, sir, and fixed that dam in the Snowslide Gulch.

Q. Did anybody else help you do any work in 1907?

A. In 1907 Mr. Ebner hired somebody else to help me, but I [268] forget who it was.

Q. You have forgotten who it was?

A. Yes, sir.

Q. Do you remember about how long you worked there in 1907 on this Parish #2 claim doing this work you have described?

A. In 1907 I think I put in over sixty days alone.

Q. Yourself? A. Yes, sir.

Q. And then you said Mr. Ebner got someone else to do some more work? A. Yes, sir.

Q. Now, in 1908 just state what, if any, work you did on this Parish #2.

(Testimony of Oscar Harri.)

A. I done the same thing, the same work,—the same kind of work.

Q. And about how many days did you work there then?

A. I worked about the same length of time, about sixty days, or a little over. I don't remember just exactly.

Q. You saw John Perelle and this other witness who just testified here? A. Yes, sir.

Q. Did you work there the same time they did or did they work after you did?

A. I worked there before they did. I started early in the spring. As soon as the snow went away I started my work and was doing it all summer.

Q. You worked there in 1907 and 1908, something over sixty days in each year? A. Yes, sir.

Q. And then Perelle and Dominick Caesar worked there in 1908? A. Yes, sir. [269]

Q. Now, did you and Mr. Ebner have any talk as to why Caesar and this other man was doing some work there?

Mr. SHACKLEFORD.—We object to that as incompetent, irrelevant and immaterial.

Judge WINN.—Mr. Ebner said that this witness—that they checked over the work he did and Mr. Ebner found it was not enough.

Objection overruled. Defendant allowed an exception.

Q. Did you and Mr. Ebner have any talk about Dominick Caesar and John Perelle doing some more work there?

(Testimony of Oscar Harri.)

By the COURT.—I sustain the objection to that, —I didn't understand the question.

Judge WINN.—I stated that Mr. Ebner when he was on the witness-stand testified that he checked over the work with Harri in 1908, and it appeared that he hadn't done a sufficient amount, and went and had these other two men come up, and I ask him now whether he and Mr. Ebner did check over the work which he himself did.

By the COURT.—You may ask him that, and then ask if Mr. Ebner found it sufficient.

Defendant allowed an exception to the ruling of the Court.

Q. Did you and Mr. Ebner go over the work you had done in 1908, did you talk it over?

A. Yes, sir.

Q. What did you find out,—did you find out that you had done enough?

A. Mr. Ebner took me down there and saw what I was doing, and I gave him the number of days I was working there and he said he would have to hire somebody else to do some more work on it.

Q. What about 1907? Did he check your work over? [270]

A. He did just the same thing?

Mr. SHACKLEFORD.—We object to that.

Objection overruled.

Defendant allowed an exception.

Q. You know Mr. Tripp, don't you?

A. Yes, sir.

Q. Do you know about what time Mr. Tripp went

(Testimony of Oscar Harri.)

up on the Ebner property and was a kind of boss or superintendent? In 1909—do you remember about the time that Mr. Tripp went up there?

A. It was somewhere in the middle of August, I think.

Q. Now, I will ask you if before Mr. Tripp went up there in 1909 you had done any work on this Parish lode #2? A. I had.

Q. What kind of work were you doing?

A. I was doing the same kind of work as I done before.

Q. Do you remember about how long you worked before Mr. Tripp came up and took charge,—about how many days?

A. I put in about twenty-five or thirty days,—I am not sure which.

Q. You put in 25 or 30 days,—do you mean working on this Parish lode #2?

Objected to as leading—sustained.

Q. What were you doing these twenty-five or thirty days before Mr. Tripp came up?

A. I done the same thing I did before. I built up that dam and had the water running through the property and sluicing.

Q. What claim was that on?

A. That was on Parish #2, I think.

Q. Where did you get the water?

A. From Snowslide Gulch. [271]

Q. Is there a dam in there, in that place up there, that you took the water out of? A. Yes, sir.

Q. Did you do any work on the dam that year?

(Testimony of Oscar Harri.)

A. Yes, it has to be rebuilt very often.

Q. Now, after Mr. Tripp went up there some time in August, did you do any work for Mr. Tripp?

A. Yes, sir.

Q. Did you do any work on the Parish lode #2 under Mr. Tripp's instructions while you were working for him?

A. We were working on the left-hand side of the creek. I don't know which claim that is on.

Q. Maybe you can tell about where it is—this other work that you speak about that you did on the Parish lode claim, is on which side of the creek as you come up the creek? A. On the right-hand side.

Q. Now, you came over and after Mr. Tripp took charge of the work, that is, in 1909, you say you did some work on the left-hand side of the creek?

A. Yes, sir.

Q. You don't know whether that was on the Parish lode claim or not?

A. I know it was on the Parish claim but I don't know which one,—1 or 2.

Q. But it is on the left-hand side of the creek as you go up the creek? A. Yes, sir.

Q. And the same side the wagon road is on?

A. Yes, sir. [272]

Q. Just tell about what work you did under Mr. Tripp on that side of the creek and about how long you worked on it.

A. We built that road; there was a slide and the road was all filled up and we built that road and we put in a tramway also and put in a compressor—that

(Testimony of Oscar Harri.)

is the road that leads from the wagon road down to the compressor.

Q. Why did you have to rebuild it—did you rebuild it or make a new road?

A. We had to rebuild it; there was a big slide took it away and we had to take that all out.

Q. Where did you put in a tram?

A. From the creek bank over to the compressor.

Q. From the creek bank over to the compressor-house? A. Yes, sir.

Q. Then, when Mr. Tripp was there in 1909, did you go back over on the right-hand side of the creek and do any work yourself?

A. No, I did not; he had another man there.

Mr. SHACKLEFORD.—We move to strike the latter part of the answer.

By the COURT.—The objection will be overruled—the presumption is he states it of his own knowledge.

Defendant allowed an exception.

Q. Did you see Mr. Tripp have some more men at work on the Parish lode #2? A. Yes, sir.

Q. In 1907, did I understand you to say you worked there alone for a while yourself, and then do you know who the other men were that Mr. Ebner got to do the work there that year?

A. I could not remember, but I think it was a fellow named John Sawney. [273]

Q. Do you know where John Sawney is now?

A. I think he is around Sitka somewhere,—I haven't heard from him.

Judge WINN.—That is all.

(Testimony of Oscar Harri.)

Cross-examination.

(By Mr. SHACKLEFORD.)

Q. How long have you lived up in this country?

A. About nine years. You mean Alaska?

Q. Yes. A. About nine years.

Q. Working for Mr. Ebner all the time?

A. No, since 1903.

Q. Where did you work before that?

A. I was out fishing.

Q. Did you ever do any mining before you came here? A. No, sir.

Q. Did you ever do any work on any other of the claims up there except the Parish?

A. Assessment work?

Q. Yes. A. No.

Q. You never did any work on the Cape Horn?

A. No.

Q. Now, what did you understand—when you told him you did work on the Parish, what do you understand you were working on? When you were sent up there to work on the Parish lode, you were sent up there to work on both the Parish claims?

A. Mr. Ebner took me down there and took me to the place to work and I was working there in the place where he told me.

Q. You don't know where you worked?

A. It was Parish #2. [274]

Q. You never did work on the Parish #1—the claim up the hill, above that?

A. I was cutting the ditch and bridge on that claim, I guess.

(Testimony of Oscar Harri.)

Q. You were doing the assessment work on both claims, were you not? A. I guess I did, yes, sir.

Q. And you went over to Snowslide Gulch and found an old dam there? A. Yes, sir.

Q. Had to fix that up a little?

A. It was mostly all gone,—I had to rebuild it.

Q. That wasn't on the Parish?

A. I don't know.

Q. Then, you turned the water over into some ditches that had been there before?

A. I guess they had been there before.

Q. You guess they had—you found them there, didn't you?

A. Yes, but they had to be opened up.

Q. And you turned them down here to the old placer pit they call the Borean pit?

A. Yes, sir.

Q. And you let the water run through that ground? A. Yes, sir.

Q. You didn't have any giant or any hose?

A. No.

Q. You didn't impound the water so as to have any pressure on it. A. No, sir.

Q. But you just turned the water of that creek over into the Parish, so it would run over the two Parish claims? A. Yes, sir. [275]

Q. And so it would run into the Borean pit?

A. Yes, sir.

Q. You had some sluice-boxes in the Borean pit?

A. No.

Q. Did you have a rocker there? A. No.

(Testimony of Oscar Harri.)

Q. Never had a rocker there? A. No.

Q. Did you have any boxes there at all?

A. They had old boxes there, but I didn't have any.

Q. There were boxes there? A. Yes, sir.

Q. Did you use them? A. No.

Q. You didn't use them at all? A. No.

Q. You didn't put a rocker up there? A. No.

Q. And you trimmed the brush away from those old ditches? A. Yes, sir.

Q. In those old ditches had the brush grown up so that you had to cut from the middle of the ditch or just from the sides of the ditch?

A. It was just over the sides of the ditch.

Q. And that was the work you did in 1907 and 1908? A. Yes, sir.

Q. Who did you say was with you in 1907?

A. There was nobody with me, but after I done my work, there was somebody sent there, afterwards.

Q. Now, nobody did any placer mining while you were up there? [276]

A. Not in that pit, that I know of.

Q. Well, on that ground, with you, there?

A. I don't think so.

Q. You don't know where the line that divides the Parish #1 from the Parish #2 is, do you?

A. No, not exactly; I ain't sure.

Q. But that place where you were working was pretty well up the hill on the claim, wasn't it?

A. It wasn't very far.

Q. It was above that bench on the creek?

(Testimony of Oscar Harri.)

A. Yes, sir.

Q. There was a bench up there? A. Yes.

Q. The only thing you did was to see that the water ran in there and ran over the ground,—turn the water in and see it ran over the ground?

A. No, I wasn't looking at the water running. I had tools with me and was using the tools.

Q. What tools did you have with you?

A. Pick and shovel.

Q. Shoveling gravel? A. Yes, sir.

Q. Did you say that there was anybody with you in 1907? A. Not with me, but afterwards.

Q. You were not there when he was? A. No.

Q. When you went back there in 1908 had the appearance of that place changed very much—did you notice any change in it?

A. No, not in the spring when I worked there.

Q. That is where Mr. Ebner told you to go to work? A. Yes, sir. [277]

Q. Now, I understand you to say that you did some work up in that pit again in 1909? A. Yes.

Q. You did that for Mr. Tripp? A. Yes, sir.

Q. The same sort of work? A. The same thing.

Q. Did you have a rocker up there in 1909?

A. No, sir.

Q. And you did some work there over on the other side of the creek? A. Yes, sir.

Q. In 1909, who did you do that work for?

A. What is that?

Q. You did some other work besides the work in the Borean pit? A. Yes, sir, in 1909.

(Testimony of Oscar Harri.)

Q. Did you do that for Mr. Tripp? A. Yes, sir.

Q. The work you did in the pit you did for Mr. Ebner?

A. I guess I did—he is the man that told me.

Q. It was before Mr. Tripp came and took the property? A. It was, yes, sir.

Q. The work that you did for Mr. Tripp is on the old road that leads down from the basin road across the Parish claim to the compressor plant?

A. I think there has been an old road there.

Q. May have been there for some time?

A. Yes.

Q. That was the road that was evidently put there to carry stuff over to the compressor when it was built?

A. I suppose that is what it was there for. [278]

Q. And you repaired that road from the Basin road down to the stairway and repaired the stairway which leads across to the compressor plant?

A. Yes.

Q. What has been your position up at the Ebner mine?

A. In 1903 I was working in the mine, and in 1903, '04 and '05 and '06 was on the compressor.

Q. From that time on, what has been your work.

A. From that time, since the mill shut down, I have been there as a watchman.

Mr. SHACKLEFORD.—That is all.

By Judge WINN.—You told Mr. Shackelford that you were watchman up there. What did you watch, —what did you mean by being watchman?

(Testimony of Oscar Harri.)

A. Of the Ebner property.

Witness excused. [279]

**[Testimony of William M. Ebner, for Plaintiff
(Recalled).]**

WILLIAM M. EBNER, recalled.

(By Judge WINN.)

Q. I will ask you, Mr. Ebner, if you have ever seen any corner posts or stakes on the northwesterly end line of the Lotta, Taku lode, Keystone lode, Crown Point lode and Golden Fleece mining claims, etc.

* * *

Cross-examination.

(By Mr. SHACKLEFORD.)

Q. Do you know where the intake of the Jualpa high line flume is on this ground?

A. Yes, I know very close.

Q. It is on the Lotta?

A. It is on the Lotta—I know about where it is. I have not looked for it on that map. I know about where it is. I can point it out approximately on the map.

Q. When was that high line flume placed on the Lotta?

Objected to as not proper cross-examination. Objection overruled.

A. I think that was in 1897. I wouldn't be sure.

Q. It was 1897 or 8? A. I wouldn't be sure.

Q. And it was not placed there with your consent?

A. No, sir.

Q. Now, I am going to ask leave of the Court to allow me to present you with these books, which I

(Testimony of William M. Ebner.)

did not have a chance to examine the other day, and ask you if it is not a fact that along about the 31st of January—

Judge WINN.—We object as not proper cross-examination.

By the COURT.—You may reopen your cross-examination for this purpose, as far as I can judge now. [280]

Q. About January 31, 1901, you started an assessment work account for the Parish lodes?

A. Yes, I think so.

Q. I will show you the book and that account—I hand you the book marked Ledger, page 99, and ask you if that account does not include the work on Parish #1 and 2 both?

By the COURT.—Better have the book identified now.

Page 99 of the book is marked Defendant's Exhibit #8.

Judge WINN.—Now, I move to strike out the question about the Jualpa high line flume—I don't see what figure it cuts.

Mr. SHACKLEFORD.—I think we will be able to develop the purpose in the argument.

Motion denied: Plaintiff allowed an exception.

The WITNESS.—What did you want to know?

Q. You say that that account represents the assessment work on both the Parish #1 and 2?

A. Not for the years given in the beginning it does not.

(Testimony of William M. Ebner.)

Q. From the time the account was started it does, don't it?

A. It does, yes, from the time the account was started until the account was ended it does.

Q. And it represents one claim just as much as the other?

A. Yes, both of them, Number 1 and 2.

Q. Now, then on the 22d of October, 1905, there is an entry \$368.55, development?

A. Yes, sir—development was credited and Parish lode was charged; yes, sir.

Q. And on the same day, having done about \$700 worth of work on the account, on the two lodes, you made a transfer from another account of \$1055.

A. Yes, sir.

Q. Now, I am going to ask you to turn to your journal—that is [281] a charge to mining.

A. Yes, that is right.

Q. And show me the items in the mining account—I don't mean in your journal entry, of this transfer, but show me back to the entries in your mining account, that you picked out of that mining account, to make that item of \$1055?

A. I will explain this. In these small items you will find either powder or some individuals that were not employed by the company, that is, their accounts here were kept by the foreman,—he kept the time, he kept a record on his time book, of the number of days that each man worked there, for each year, and it was not charged to the Parish lode, it was charged to mining, the development work, for

(Testimony of William M. Ebner.)

several years, until we finally concluded that it was better to segregate it, so we went over the time-books and segregated it and credited to mining what belonged to the Parish lode and credited to development work what actually belonged to the Parish lode, what work was performed there.

Q. I want you to trace back the books and trace those items back to where they came from?

A. It is impossible to find that from here because I had my bookkeeper, whoever he was—I don't know whose handwriting that is—go over the time-books and find the days, the number of days that have been charged to mining and been charged to development.

Q. You didn't go over them yourself?

A. Not altogether, no. I gave him instructions what to do. I said, "You segregate them."

Q. Now, Mr. Ebner, the time-books, the pay-rolls and all the original data of the Ebner Company have been lost?

A. No, they have not been lost, but I can't find them just now— [282] some of them were boxed and shipped to where I live now. This stuff was put in the vault and some of it may have gotten lost after the thing was audited and these things were passed—and with the large accumulation of papers and the old ones, why some of those may have been lost.

Q. The Ebner corporation up to the time the California & Nevada took an interest in the matter was a close corporation?

Judge WINN.—We object to that—there is no evi-

(Testimony of William M. Ebner.)

dence about the California & Nevada taking charge.

Objection overruled. Plaintiff excepts. Exception allowed.

Q. The Ebner Company up to the time Mr. Tripp came up here had been a close corporation?

A. What do you mean by a close corporation?

Q. I mean it had been under your control all the time. A. To a certain extent.

Q. There are two other gentlemen interested with you? A. Yes, sir.

Q. Mr. Young and Mr. Behrends?

A. Yes, sir—more than that.

Q. And a scattering of stockholders who live in Boston? A. Yes, sir.

Q. Has Mr. Behrends or Mr. Young or the stockholders in Boston ever audited your accounts?

Judge WINN.—We object as incompetent, irrelevant and immaterial—Mr. Shackleford has introduced these books of account and he is bound by them.

Objection overruled. Plaintiff allowed an exception.

A. The Board of Directors audited the books,—that is Behrends and Young—

Q. Audited the books? A. Yes, sir. [283]

Q. And when you referred to the account being audited—was the auditing made under your direction? A. Not altogether; no.

Q. What about your vouchers?

A. Those are boxed up. I don't know whether we have all the old vouchers or not,—most of them, I guess.

(Testimony of William M. Ebner.)

Q. You never kept a day-book?

A. You mean a blotter? No, we never kept a blotter.

Q. So your original entries are on your pay-roll?

A. We had just so many accounts and then when we adopted the system of copying our pay-roll into the journal, why from that time on. Before that we would make out our pay-sheet—we had a pay-sheet and charged off the pay-sheet.

Q. When did you adopt that system?

A. What system is that?

Judge WINN.—We object to this as improper cross-examination. If he is making the witness his own—he cannot offer a set of books and then impeach them; it is incompetent, irrelevant and immaterial.

Objection overruled. Plaintiff allowed an exception.

Q. When did you adopt the system of extending your pay-roll in your journal?

A. I don't remember. Somewhere about 1903 or 4; somewhere along there; the pay-roll account will show when it was started.

Q. Look at that—

A. It was started in February, 1903.

Q. (Continuing.). And tell me where these items came from that made up the \$1,053?

A. The assessment work there was not carried on to the pay-roll, as I testified here once before,—in other words, it was all [284] charged to mining on the pay-rolls.

Q. So when the segregation was made, it was more

(Testimony of William M. Ebner.)

or less of a guess?

A. No, it was made very carefully from the time-book.

Q. From the time-book?

A. Yes, sir, because the foreman, when he had a man working there, for instance—he had an account and under each man's name was a line or two, so when he put him on some other work, he would note it on the time-book.

Q. That was done by Mr. Waldo Hart?

A. I think so—not altogether. I helped to work on the time-books.

Q. What about the time-books—do you know where they are? A. No, sir, I do not.

Q. Have you made any search for them?

A. I have.

Q. When?

A. Since I was in court, the first day.

Q. When you boxed your books, did you inventory them—do you know which you sent south and which you kept here? A. No.

Q. Where did you look for the time-book?

A. Among the papers, the rolls of papers and bundles I have in the office there.

Q. Is that in the possession of the California & Nevada Company? A. No, sir.

Q. Where is your bookkeeping after 1906?

A. We haven't any bookkeeping in those books—we haven't done any business. [285]

Q. Where is the accounts that have been kept since then, since 1906, when these books end?

(Testimony of William M. Ebner.)

A. Since those books end, there has been no books kept.

Q. No books kept? A. No, sir.

Q. Have you any vouchers?

Judge WINN.—Objected to as incompetent, irrelevant and immaterial. It is not proper cross-examination.

By the COURT.—Both sides reserved the right to use the witness later. Objection overruled. Plaintiff allowed an exception.

Q. Where is your data and accounts and vouchers or other memoranda from which your books could be made up from that time to the present?

A. I haven't any.

Mr. SHACKLEFORD.—That is all.

(By Judge WINN.)

Q. I want to ask you if you know the size of your fifteen-stamp mill that is up there on the property that you testified concerning when you were on the witness-stand before. I didn't ask you the size of it.

A. I think I know the exact length. It is 80 feet, and the width, I wouldn't be sure by two feet; it is either 32 or 34 feet wide and the same height,—32 feet.

Q. Since what year have you been acquainted with that building that you have just described?

A. Ever since 1891.

Q. Has it ever been added to or decreased in size or has it remained as it is?

A. Just the same. [286]

(Testimony of William M. Ebner.)

Q. Has there ever been on the Ebner Gold Mining Company property that is described and set forth in this exhibit "N," the Golden Fleece, Crown Point, Keystone, Taku, Lotta lode, and including the Parish #2 any other mill on these premises since the date you first mentioned?

A. No, sir; except what they call the compressor-house.

Q. I mean a stamp-mill?

A. No, not a stamp-mill.

Q. What time did you increase the number of stamps in that mill from ten to fifteen—do you remember the year?

A. I think it was in 1898—no, it was later, I bought machinery but didn't put it in. I think it was in 1901. I wouldn't be sure just what time it was.

Q. Did you in adding these five extra stamps alter the mill any?

A. No, the ten stamps were set about the center of the mill and I put them one side of the ten stamps that were there—the five stamps.

(By Mr. SHACKLEFORD.)

Q. When was the compressor put in?

A. We started on that in 1897.

Q. I see a mark on here, on the lower line of the Lotta as exhibited on "N" marked "chute"—that is a stairway?

A. That was a chute and a stairway so we could slide the heavy machinery down.

Q. That is, there was a place opposite the steps?

(Testimony of William M. Ebner.)

A. Yes, alongside the stairway there was a side chute built of heavy timbers and planks, by which we could lower the machinery. [287]

Q. That is connected with a spur that runs by the Basin road?

A. Yes, it was, at that time the road was built there.

Q. So as to assist in building the compressor?

A. Yes, sir.

Q. There has been a vanner-room and wheel-house added to the Ebner stamp-mill within the last ten years? A. No, sir.

Q. Never has been?

A. No, sir, there was not; that is the way the mill was built; the mill originally consisted of ten stamps and four frue vanners, rock-breaker and water-wheels, with a water transmission—with a water-wheel way down on the creek.

Q. This cabin near Corner #5 of the Lotta, was that there when you first saw that corner?

A. Yes, sir; that was there when I first saw it, but I understand it was just built there—it was near Snowslide Gulch and it was built there the year before I came into the country.

Q. It is in the same position now it was then?

A. Yes, sir; it is in the same position now it was then.

Q. But it was not part of the improvements in connection with the Lotta lode?

A. I don't think so, because the man had previously occupied the house a little further up the hill

(Testimony of William M. Ebner.)

from there, towards Snowslide Gulch, as I understand. I don't know positively about that, but it was there when I first came to the country.

(By Judge WINN.)

Q. Mr. Shackleford asked you some questions about the Jualpa high line flume—if you opposed the Jualpa Co. taking water [288] from there, how did you finally settle that matter with the Jualpa Company?

Objected to as incompetent, irrelevant and immaterial. Objection overruled. Defendant allowed an exception.

A. We settled that by their buying a certain amount.

Q. You had some paper written about it, didn't you? A. Yes, sir.

Q. And you finally granted them permission to go across the Lotta claim and take the water?

A. Gave them the right of way, yes, sir.

(By Mr. SHACKLEFORD.)

Q. And they also crossed your Cape Horn lode?

A. Yes, sir.

Q. Was that money paid to you or the Ebner Gold Mining Co.?

A. The Ebner Gold Mining Co.—look on page 99,—you will see the charge.

Q. The full amount was paid to them?

A. No, sir.

Q. This—Last Chance Gold Mining Co. property and plant, \$5,000 June 30th W. M. Ebner \$5,000—that was not the full amount?

(Testimony of William M. Ebner.)

A. That was not the full amount; no, sir.

Mr. SHACKLEFORD.—I am going to offer page 99 of the Ledger in connection with the cross-examination of the witness. We offer page 99 of the Ledger.

It is admitted.

Witness excused. [289]

[Testimony of H. T. Tripp, for Plaintiff.]

H. T. TRIPP, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Judge WINN.)

Q. What is your name? A. H. T. Tripp.

Q. How long have you lived in Alaska?

A. Since 1897.

Q. What business have you been engaged in the principal part of the time you have been in Alaska?

A. Mining.

Q. In what capacity have you been engaged in the mining business, at various times, during that period in Alaska?

A. Well, mine manager and looking after mines—trying to find mines, etc.

Q. You have also been superintendent and conducted the operation of mines?

A. Yes, sir; that is what I came here for first.

Q. How long were you engaged in actively running a mine in Alaska at one time,—that is, where you were milling ore? A. Seven or eight years.

Q. And during that time did you have quite a

(Testimony of H. T. Tripp.)

number of men employed under you?

A. Yes, sir.

Q. Now, Mr. Tripp, you are acquainted with the property that is known as the Ebner Gold Mining Co. property, that is, you have a kind of general acquaintance with the property, haven't you, as a property? A. Yes, sir.

Q. You have been on that property quite a little bit, off and [290] on, for these last few years?

A. I have.

Q. Been on there in various capacities?

A. Yes, sir.

Q. You consequently are pretty well acquainted with it as a property, that is, in a general way?

A. Yes, sir.

Q. Now, Mr. Tripp, you know the young fellow I had on the witness-stand a while ago, Oscar Harri?

A. I do.

Q. You had control of some work that was going on, did you not, on this property, in the year 1909?

A. I did.

Q. Do you know where the two Parish lode claims are, Number 1 and 2?

A. I know pretty nearly where they are; yes.

Q. Prior to the year 1909 and in the year 1908, you heard Mr. Ebner and some of the witnesses testify here that you were with a party of persons that brushed out some line along on one of the lode claims belonging to the Ebner group of mines?

A. Yes, sir.

Q. You are the same H. T. Tripp? A. I am.

(Testimony of H. T. Tripp.)

Q. Now, I will refer you to this exhibit which we have offered in evidence, called "N," and just indicate to the Court there what you did in regard to the brushing out of some line there, in company with Mr. Ebner, I believe, and Mr. Wettrick and who else was along—Mr. Hill?

A. Wettrick, Hill and Oscar Harri and, I believe, a man named [291] Kirk was along.

Q. Now, if you will step over to this exhibit and point out so it can go into the record—show what line you brushed out there.

A. I took Wettrick and Hill and went up with them to the Ebner mine, and we came down an old road, if I remember right, because it was not convenient to go up the other way—I can't remember distinctly that we went that way, but I think we did—that is an impression—and when we came down the road we commenced measuring around and looking into the brush and underbrush for a certain stake that was going to be the starting point, and after considerable measuring and looking around, why we got on to the old ax marks and brushed our way up and found a stake that I suppose that this represents in fact. I know in all line of common sense that that was the place we found, that is in conformity with all the rest of the lines.

Q. That is you mean—

A. The line which is the southwest corner of the Lotta, I think—that is the way I read it; I believe you call it #5.

(Testimony of H. T. Tripp.)

* * * * *

Q. I thought you said a while ago that you found a stake there?

A. We found a stake over here at #5.

Q. The way you are giving your testimony I gathered you did not find a stake at the old cabin?

A. Yes, sir; that was the starting-point.

Q. Did you or did you not reset that stake at 5?

A. We put another stake down but there were two or three stakes there. I remember there was a bunch of stakes and I think some old wire or nail or something of that kind [292] that fastened one stake to another; that is all I remember—I believe I made a mistake. I think we brushed out a line down to the creek first or we went over along a line that was sighted to from some point or flag or stake that we put over here on the road.

Q. Across the creek?

A. Across the creek on the wagon road going to the Basin—I remember that distinctly because I found that stake and cut the brush.

Q. You say you found that stake?

A. I found a stake setting on the road and cut the brush from around it myself, so that it could be seen from across the creek.

Q. Is that the same stake you have heard some of the other witnesses testify to here?

A. That is the stake marked.

Q. W C 2, marked W C 2? A. Yes, sir.

Q. What purports to be on the boundary line between the Parish lode #1 and the Lotta lode?

(Testimony of H. T. Tripp.)

A. Yes, sir.

Q. On this map? A. Yes, sir.

Q. That stake was there?

A. That stake was there.

Q. Did that end up your work when you were up there at that time?

A. No, we went along over, as I said, and set a stake on the corner of the Parish and then we brushed a line out which would be the southwesterly end line— [293]

Q. Southeasterly—

A. I don't know. It is the line between the Parish #1 and 2, I suppose, and we crossed over a cut and went over some very bad ground there, that is, very brushy ground and went down over the hill and found—I don't know whether we found a post there or not. I can't remember that we did find a post there—and then we turned a corner and brushed out over another parallel line to the one we had brushed out before to cut around the Parish ground and when we got down into that—that was as far as the creek line that we did our brushing.

Q. You went down, then, what you are indicating on the map as the southwesterly side line of the Parish lode #2?

A. Yes, the southwesterly side line of the Parish from the corner of—I can't see; I can't tell what corner that is.

Q. That is corner #4, being the southwesterly corner of Parish #2.

A. Anyway, we brushed out the line over to the

(Testimony of H. T. Tripp.)

creek, supposed to be on that line—I think it was—and from that point we traversed across the creek and down over the Snowslide and around into Jualpa Basin and up the creek a ways and from that on, I don't remember—I wasn't with them all the time; they did all the work. I was with them another day when they did some more work down below,—that is practically all in regard to that—I wasn't with them when they established these other corners up here.

Q. That about finished up your trip with them?

A. Yes, sir.

Q. That was in 1908? A. Yes, sir. [294]

Q. In 1909 you put in quite a little bit of time up there on that property doing various things?

A. Yes, sir.

Q. Just state generally what you were doing up there.

A. Well, I was there more or less during July—on the 18th day of August I practically took charge of everything up there.

Q. Was this young fellow Oscar Harri up there when you went up in August? A. Yes, sir.

Q. He had been there as watchman, had he not, prior to your going up there in August?

A. Yes, sir.

Q. And when you took charge there in 1909, in August, state in a general way what work you did up there; that is, I don't mean particularly the direct work that was done on the two Parish claims, but state in a general way what work you did. I

(Testimony of H. T. Tripp.)

am not referring to any particular work on the Parish claims, but generally what work were you doing?

Mr. SHACKLEFORD.—We object to that as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

A. My work was from the top of Mount Juneau. clear along the lode line and as far as the joining of the Juneau-Alaska ground.

Q. In fact, you were doing work during that summer and fall over about all of what is known as the Ebner group of claims and also on the Cape Horn lode claim, of course including the two Parish lode claims? A. Yes, sir.

Q. Did you have anybody in your employ and employing any other [295] men to aid and assist you in your work that you were doing there?

A. I had several men there.

Q. About how many?

Mr. SHACKLEFORD.—We object to that as incompetent, irrelevant and immaterial

Objection overruled. Defendant allowed an exception.

A. I could count up on the time-book how many I had,—seven or eight or nine men, I don't know. At different times I had more.

Q. Did you have Mr. Wallenberg, a mining engineer, also in your service?

A. I had a man named Wallenberg, yes, sir.

Q. A civil and mining engineer?

(Testimony of H. T. Tripp.)

A. I had him, yes.

Q. What work generally was he doing up there?

A. He did the assaying and mapping or anything in that line.

Q. What do you mean by mapping?

A. Well, I mean wherever I found any values around on the ground I had him map it in and do that kind of work; that was my purpose, to try to find values at any place on the property.

Q. You had quite an extensive topographical survey made by Mr. Wallenberg? A. I started to.

Objected to as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

Q. He was engaged in your service up there how long?

A. Well, he was—from the time he started to work—he was in my service before I took charge of the Ebner mine for a couple of months, that is, before I had the property [296] turned over in my care, before I had the keys to the property.

Q. You said you did considerable surveying, topographical surveying and also assaying,—I will ask you to state to the Court what was your object in going up over this property and having this topographical survey made and also making the test of the values at different points, etc., on this property,—what were you doing it for?

Same objection. Objection overruled and exception noted.

(Testimony of H. T. Tripp.)

A. I wanted to determine any lines of value, anything that would be in the shape of lode lines or belts of country that would carry values in paying quantities.

Q. Over that entire property? A. Yes, sir.

Q. Including the Parish lode claims, too?

Objected to as leading. Objection sustained.

Mr. SHACKLEFORD.—I am now going to ask counsel for his purpose in asking the last few questions.

Judge WINN.—I will state what my purpose is. We expect to show by Mr. Tripp that he was put to work up there for the purpose of doing just exactly what he said he was doing and also he was to keep up the assessment work on the Parish lode claims and also on the Cape Horn lode claims and some other claims. We expect to show that his ultimate object in doing what he was doing—he was put on there for that purpose, to do what he testified he was doing, in order to determine the most feasible way of opening up that property as a big property; and the undertaking of building a 200-stamp mill down here, we expect to further show by Mr. Tripp that he consummated his purpose to this extent, that after he had had these surveys made and commenced testing, he got along [297] to an extent anyway that he had concluded to undertake to open up this property on a larger scale as we have pleaded and undertook to build a tunnel in about where this big tunnel is marked—Ebner mine tunnel, on this plat “N.” We expect to show further along that he undertook and

(Testimony of H. T. Tripp.)

did commence the driving of a tunnel nearby; we expect to show that that tunnel put on there was for the purpose of opening up and developing this entire property, and the tunnel would have run as started through the Parish lode claim. We expect to show in connection with that that the assessment work was done on the Parish lode claims in various ways and when we get to that, if counsel wants to object, why he can object. That is the general plan—that he went there to open up this property on a larger scale, and perhaps how it was determined by Mr. Tripp that down here was the place to build the mill and he undertook the running of that tunnel, which was just changed a little, but the tunnel they are driving now, which we will show is now over 400 feet in, would run virtually parallel and would tap the same country, and we expect to show that the work done down there is work that tended to open and develop the entire property, a lot of it, and tended to do the assessment work on the Parish lode claims, altho we will show how much was done on these claims outside of what Harri has testified he did.

Mr. SHACKLEFORD.—It is conceded in this case that counsel dismissed a suit on the Cape Horn lode,—the work starting on the Cape Horn extension here shows it out of contiguity with the rest of the claims. The further objection to the testimony—simple reconnaissance work under no circumstances [298] is assessment work. We contend that reconnaissance work cannot be introduced in his case

(Testimony of H. T. Tripp.)

in chief, unsegregated reconnaissance work, upon the whole series.

Objection overruled at this time. Defendant allowed an exception.

Q. I will ask you if this topographical survey you had extended over the entire Ebner property. You know what is meant by the Ebner property. It means the patented property and the two Parish lode claims,—you understand that?

Objected to as leading. Objection sustained.

Q. Now, Mr. Tripp, I will ask you to state to the Court just what mining claims in this Ebner group that this topographical survey you were making and the sampling extended over, up to the time you quit the work.

A. The work of sampling—very little was done on the claim called the Crown Point claim, very little, but the Taku lode and perhaps the Keystone—no, the Taku lode, I think, had the most of the work done on it, that is, in the shape of getting it blocked out in squares and the assays—I got returns from the assays from the cuts and various places and openings I made.

Q. As I understand, then—

A. It might perhaps, some of it, be on the Lotta. I know it was.

Q. You know where the Lotta was?

A. Yes, I do.

Q. You know where the boundaries are?

A. When it comes to the boundary lines on the brush and steep sidehills, it is impossible to tell

(Testimony of H. T. Tripp.)

where you are.

Q. You did some cutting—did you find these samples right on top of the ground? [299]

A. No, we generally found something to indicate, something to start us digging there, from a line or something else we had, or something that was cropping out; from the indications, from having values in one place, they would probably be in another.

Q. You were doing what you might term general prospecting work?

A. Yes, sir, that is what I was doing.

Q. You are a mining man?

A. That is my business.

Whereupon court adjourned until to-morrow (Saturday), May 27, 1911, at 10 o'clock A. M.

May 27, 1911—Morning Session.

Continuation of the direct examination of Mr. TRIPP.

(By Judge WINN.)

Q. Mr. Tripp, you are sufficiently well acquainted with this Ebner property, including the Parish lode claim #2, to know approximately where the boundaries of that claim are, are you not?

A. Yes, I am.

Q. Now, you were speaking yesterday about having contour lines made and that you had Mr. Wallenberg go over this property with you and make some sort of a survey. What was your purpose in having this work done by Mr. Wallenberg?

A. Well, my purpose was to determine where to

(Testimony of H. T. Tripp.)

put a mill, where to locate a mill for the benefit of all of the Ebner property, and consequently if I found the right place to put a mill, to drive a tunnel, a working tunnel, for the benefit of all the property.

Q. You know where the little mill, the 15-stamp mill of Mr. Ebner's is, the old mill up there? [300]

A. I do; yes, sir.

Q. Now, was this work of yours done with the expectation or intention or purpose of mining this property and milling its ore through this mill of Ebner's or for some other purpose?

Mr. SHACKLEFORD.—We object to that as incompetent, irrelevant, immaterial.

Objection overruled. Defendant allowed an exception.

A. My intention was to locate a tunnel for the benefit of the property, where I would have ore overhead. I was looking for values and the place to mine for value.

Q. Was your work there with the expectation of building a mill at the upper end of the property or the lower end of the property?

A. I calculated to go below the ore.

Q. Then, you would have to come down the creek to do it?

A. I never had any intention of having a mill erected anywhere above or in the neighborhood of the water-power, or on a level with the water-power, or anywhere around the neighborhood of the old mill; no, sir.

Q. Now, I will ask you as a mining man in pros-

(Testimony of H. T. Tripp.)

pecting surface and ore bodies, etc., if that is any aid or assistance or guide to you in indicating to you where a tunnel should be opened for the purpose of developing a mining property?

Same objection. Objection overruled. Defendant allowed an exception.

A. Certainly it is.

Q. Now, I will ask you, aside from this contour work you had Mr. Wallenberg doing, what other work, if any, did you do towards prospecting that property, in order to ascertain [301] where the best place would be to run a tunnel for the opening up and mining of the property—what did you do yourself?

Same objection. Objection overruled. Defendant allowed an exception.

A. The whole property, do you mean?

Q. Yes, the whole property, and I wish you would get down particularly, also, to the Parish #2, but tell generally what you did with the whole property.

A. Well, I did work all over the property,—that would be over the Parish and on the Parish #2, and I crosscut and sampled and assayed all over the side of the hill through which a tunnel might be driven if it went directly into the main lead of the Ebner mine, the main dyke called the Ebner mine dyke, to get to the proper place for the commencement of the work, and if the tunnel ran directly under this work, why it would go under the most values—that was my idea in that.

Q. And that was the purpose of your work there?

(Testimony of H. T. Tripp.)

A. That was what I was there for. I was left there to choose a place for the mill and open the mine—that was my business on the property.

Q. About how much work did you say you did upon this Parish #2 claim, in the work you have just indicated you had been doing?

Mr. SHACKLEFORD.—We object to that—reconnaissance work in the way of sampling is never considered as assessment work.

By the COURT.—This question may be answered.

Q. Tell what kind of work you yourself did on this Parish #2 lode claim during that year, leaving out any other work done by Mr. Wallenberg or any one else—but what kind of [302] work were you doing on that Parish #2?

A. I was all over that ground looking for something of value to determine the best way to open the whole property and to drive a tunnel that would go underneath it,—to get the proper direction for the main working tunnel, for the whole property.

Q. Did you have at any time anyone with you on the Parish #2?

Objection overruled. Defendant excepts.

A. Yes, I had men with me most all the time.

Q. Did you do anything else in regard to working on the Parish #2 except looking it over—did you do any manual work there, and if so, explain it to the Court.

Same objection. Objection overruled and defendant allowed an exception.

A. That I did myself?

(Testimony of H. T. Tripp.)

Q. Or the men with you, assisting you?

A. I did work myself, as far as that is concerned.

Q. That is what I am getting at—what you did yourself.

A. My first recollection after I came down is of doing something in the shape of assessment work and that assessment work—I sent a man down there by the name of Dewey. I sent him first to clean out the ditch that came from Snowslide Gulch and he couldn't find the ditch, so I think I sent Oscar Harri down there to show him where it was, and then afterwards I went down there myself with him, and I remember very distinctly of helping him build up a dam and working with him myself.

Q. What were you building up a dam for?

A. To turn the water out of Snowslide Gulch to go through a ditch to run down on to the property—the Parish #2. [303]

Q. That is the same dam that you were referring to in your testimony, that you heard Mr. Ebner testify to on the witness-stand, the dam up there on Snowslide Gulch?

A. I don't know that I was questioned on that subject before.

Q. But I say the one Mr. Ebner testified to—you heard Mr. Ebner's statement?

A. I heard Mr. Ebner—it is the same dam that Oscar Harri testified he had the water running through before I took charge of it.

Q. Now, state to the Court about how much work was done on that grade to prepare it to divert the

(Testimony of H. T. Tripp.)

water for the purpose you have indicated.

A. Well, evidently there had been some kind of a flood down Snowslide Gulch and had taken the rocks off from a sort of falls or big rock formation that passed across the creek, on which this dam was made, and then the flood water running around the ditch, shut off or cut off the top of the ditch for probably 50 or 75 feet; besides that ditch was more or less clogged by the vegetation. How as to the amount of work, I don't remember exactly—I think probably a couple of days cleaned out that ditch and got the water down on to the ground. Besides what I did, I don't think that this man was there over two or three days before he got the water running.

Q. That is, at that particular time? A. Yes, sir.

Q. Now, you say you were there and aided in putting this dam in repair. Now, what other work during the whole season up there did you do, if any, yourself and, of course, if it is necessary to state in your answer that you had somebody [304] with you assisting you, why do so—but I mean work that was looking towards prospecting that claim for mineral.

A. You mean how much time I put in or what the value of it was?

Q. I want to find out just what you did first, no matter whether you were alone or somebody with you. You stated now that you did some work on the dam to divert the water? A. Yes, sir.

Q. Now, any other work you did there on this one particular claim and what kind of work—I wish you

(Testimony of H. T. Tripp.)

would state to the Court whether you were alone or whether somebody was with you.

A. I have been up and down the canyon several times examining the formation, picking off pieces of rock and doing that class of work—that would naturally come in my line. The canyon crosses, or the Parish #2 claim crosses the creek and there is a lot of this country that is exposed, that is the Parish #2 claim, exposed in the creek. There is no brush there, it is a very handy place to get at. I did a lot of work up and down the creek myself, with my own hands and in the way of an examination, breaking rock off and doing testing work and digging into the bank with my pick.

Mr. SHACKLEFORD.—We move to strike that answer as immaterial to any of the issues in the case.

Motion denied. Defendant allowed an exception.

Q. What were you digging there for?

A. Looking for something in the shape of rock that would carry value.

Q. Now, did you have anyone else do any work there for the same purpose you have just indicated?

Same objection. Objection overruled and defendant allowed an exception. [305]

A. I had trails brushed out all through, all over that part of the claim on which—let us say it is located on the southerly side of the creek, the Parish #2, on the southerly side line,—I had trails brushed around through there, so I could get around myself or anybody else could get around, and I had the men instructed to look for ore either in place or in slide

(Testimony of H. T. Tripp.)

or anything that looked like ore.

Q. What purpose did you have that water used for, when you diverted it from the stream? I understood you let the water down from the dam to the Parish #2 lode claim? A. Yes, sir.

Q. And cleaned out that ditch for that purpose?

A. Yes, sir.

Q. When you got the water down there—I am asking you—

A. It was my intention to do some sluicing there on the lines Mr. Ebner testified to, and I was desirous of finding whether there was anything in the shape of pay in the surface dirt there. If I found any pay in the surface dirt it would indicate to me that there was something of value underneath or above at some place, and along that line, I had a little cut run and I had this man Dewey carry lumber down and build a sluice-box and shovel dirt in for a day or two days,—I have forgotten which,—to determine something about the value.

Q. Now, Mr. Tripp, I will ask you if the formation of this mining property, particularly this lode claim, is such that you, as a mining man, in sluicing off the earth from the top of what might be the vein or the ledge or lode, whichever it may be, would be of any assistance to you in determining the value of the lode or lead or whatever formation that is [306] up there?

Mr. SHACKLEFORD.—We object to that as misleading. Counsel is quoting the witness as having removed the dirt from the top of the formation and

(Testimony of H. T. Tripp.)

the witness has actually testified as to sluicing the dirt for the purpose of determining whether it had values in it and then subsequently looking for the ledge.

Objection overruled. Defendant allowed an exception.

A. O, don't know exactly what that question is.

Q. I will ask you if this kind of work you were doing there,—you say you were sluicing off to find values,—would be of any assistance to you in determining the value of that piece of property as a quartz mining claim or lode mining claim?

A. I think that any values found in the surface are an indication of values there, lead matter, in that particular section of the country. I would say that on the general line that through this section of country there are no regular gravel channels. All gold comes from leads or lead matter or lead formations, anything in the shape of placer ground found in this country comes, according to my belief, from the quartz leads.

Q. From the decomposition of the quartz lead?

A. Yes, sir, or the erosion. I think you will find that the same over on the Treadwell mine. I believe the Treadwell mine was discovered first by the dirt that was on the surface carrying gold—I know that is a fact in California along the mother lode. I don't believe there is a regular mine on the mother lode that the old prospectors did not discover by ground sluicing up to it.

Q. Now, I ask you if this sort of work would be of

(Testimony of H. T. Tripp.)

any assistance [307] to you in indicating as to where would be the best place to run a tunnel for the opening up, developing and mining of this property, of course, including the Parish #2 lode claim?

A. Well, it certainly would—

Mr. SHACKLEFORD.—We object to that as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

The WITNESS.—(Continuing.) I couldn't drive a tunnel very well through from any point below without driving a main working tunnel through the Parish ground.

Q. Parish Number 2?

A. Parish #2, yes, sir; and if I chose to run further to the north or to the south, I would be governed by the conditions that I found on the surface and which I thought would run underneath the most of the surface values.

Q. Now, besides the work that you did on the Parish #2, how many days' work altogether did you have done for the benefit of this claim and the Parish #1 which adjoins it?

Mr. SHACKLEFORD.—We object to that as incompetent, irrelevant and immaterial and no foundation laid for the question.

Q. I mean besides the work you did yourself, how many days' work upon these two claims did you have done as assessment work—as assessment work for the year 1909?

Mr. SHACKLEFORD.—We object as calling for

(Testimony of H. T. Tripp.)

a conclusion of the witness.

By the COURT.—He may answer but at the same time stating what the work was.

Defendant excepts. Exception allowed.

A. Well, I had fifty-one days' work done on those two claims and it consisted in digging roads and chopping trails and [308] the work that I carried out and instructed in the shape of giving Mr. Dewey the orders to pan for anything that he found in crossing and recrossing through the great thicket of brush that is up there on these claims, on the south side.

Q. Now, I will ask you, Mr. Tripp, does the brushing off, is it or is it not any aid or assistance in the other work that you were carrying on there, to find out about the formation and uncovering or removing the earth from the top of the ground—is the brushing of any assistance,—does that have to be done?

Mr. SHACKLEFORD.—We object to the question as incompetent, irrelevant and immaterial.

By the COURT.—On that ground it is overruled, but it is leading.

Q. I will ask you what you brushed off on this trip?

A. A man couldn't go through there at all without brushing it off; the ground now looks like a broken down corn-field, and along in the summer time, it is almost impossible to go through that country. It is filled with devil clubs where the alders don't grow up, and they stand up about fifteen feet over your head, and to make any kind of a crossing in there you have to cut your way,—it is a regular jungle and thicket.

Q. I will ask you, Mr. Tripp, would that be any

(Testimony of H. T. Tripp.)

work that would precede the moving of the earth from the top of the ground, what you might consider the ground?

A. It would precede, it would precede anything.

Q. How much of this work, Mr. Tripp, approximately how many days of it was done on the Parish Lode #2?

A. Well, nearly all of it. I had a trail dug out or chopped [309] out so that it led up from the Jualpa flume on to that property across Snowslide Gulch and that part of it would have been on Number 1.

Q. Which one of those claims is the lower claim,—the Parish #2 or #1?

A. The Parish #2 is the northerly claim.

Q. Is that down the hill or up the hill from the Parish #1? A. It is lower, on lower ground.

Q. Parish Number 2 is? A. Yes, sir.

Q. If you have any other way to explain to the Court how this work would be beneficial to the lode claims in question, I wish you would state it.

Mr. SHACKLEFORD.—We object to the question—it calls for an argument.

By the COURT.—No, it calls for an opinion of the witness on a matter in which the witness is supposed to be an expert.

Objection overruled. Defendant allowed an exception.

A. You want me to state as to what I think would be assessment work on that property?

Q. Well, particularly the question was as to

(Testimony of H. T. Tripp.)

whether this work would be beneficial as assessment work, and I asked you to state to the Court why in your opinion it was beneficial for that purpose.

Same objection.

By the COURT.—As assessment work,—that is a matter of law. The question will be whether this work would be of benefit in developing and improving this particular claim.

Q. With the modification the Court has made to the question, I wish you would answer it. [310]

Same objection. Objection overruled. Defendant allowed an exception.

A. If I could find anything in this great big thicket of brush like an outcrop of ore that would be of value and cause me to change the direction of a tunnel so as to go directly under that ore or go in the neighborhood of it, it would certainly be of a great deal of value to that property. That is what I was hunting for. I was doing the same class of work on the patented mines above, on which the assessment work did not come into question at all.

Q. Now, I will ask you if this work on the two lode claims, the Parish #1 and 2, was directed towards the assessment work?

Mr. SHACKLEFORD.—We object to that question as calling for a conclusion of the witness and leading.

(By the COURT.)

Q. You had agreed to do this assessment work?

A. I understood it was my business.

Q. You didn't do any other work than you have

(Testimony of H. T. Tripp.)

described? A. Yes, I did.

Q. Tell what the work was.

A. Any work that I did on that ground after or that was done besides myself in the shape of digging roads or anything of that kind, I charged to assessment just in a general way, and I had a road dug from the main road down to the head of the stairway that leads to the compressor, which is on that ground—

Mr. SHACKLEFORD.—You mean the stairway is on the ground?

A. The stairway that is on that ground, or was on that ground or starts from that ground and leads down to the compressor. That road was practically obliterated, it was covered by a [311] slide, and I had that road completely cleaned out, so that it would go down; and I had a tram built and a deadman put in and a cable that was about three hundred feet long,—I think something in that neighborhood,—fastened to this deadman and run down and fastened to the rock next to the compressor. That was a part of the work that I did—cleaned out the road, put up the tram myself. I never charged my time up,—I charged my time up to managing expenses.

Q. You were the manager of all the work and directed the work up there? A. Yes, sir, I was.

Q. And those men that you put to work on the Parish claims, did you direct them what to do?

A. I certainly did.

Q. Now, this work of building a road down from the main road to the air-compressor—is any part of that road on the Parish #2? A. It is, yes.

(Testimony of H. T. Tripp.)

Q. On which side of the creek as you go up?

A. Well, it is on the northwesterly side.

Q. The left-hand side as you go up the creek?

A. The left-hand side as you go up the creek; yes, sir.

Q. Now, I will ask you if you did any work in putting that air-compressor in condition to use it?

A. I did; I had a new shaft put in that air-compressor, took the old one out. I had the water-wheel repaired and all lined up, and I spent in the neighborhood of two hundred dollars putting that air-compressor in shape.

Q. You have not counted this work on these fifty-one days that you say you have done? [312]

A. No, sir, that has nothing to do with it—that is charged to machinery account.

Q. I will ask you what was your purpose in putting that air-compressor in condition?

Objected to as calling for a conclusion of the witness. Objection overruled. Defendant allowed an exception.

A. I had decided on a line of tunnel way down on the Cape Horn that would have come under those claims.

Mr. SHACKLEFORD.—We object to any testimony with reference to the tunnel on the Cape Horn, because it appears from the admissions of counsel in the case and from the dismissal of the Cape Horn cause of action that the Cape Horn does not belong to this group of claims and that the tunnel mentioned in the witness' answer is not contiguous to it.

(Testimony of H. T. Tripp.)

Judge WINN.—We expect to follow that up with evidence of Mr. Ebner that he directed this.

Objection overruled. Defendant allowed an exception.

A. I had decided on the location of a tunnel that would crosscut that country and I had faced up and prepared for machine drills, and I had put that machinery in shape and I had also put the dam in shape and the flume in shape. I had rebuilt the dam,—the dam had been washed out and I spent over two hundred dollars in fixing that dam and preparing it to run the water down to run this compressor.

Q. On this map, Plaintiff's Exhibit "N" in this case, there is marked a tunnel, called the Ebner Mine tunnel—you know where they are running that tunnel now, do you not, on the ground,—that big tunnel Mackey is running? A. Yes, sir, I do.

Q. Now, I will ask you to state to the Court approximately where you had determined to locate this tunnel for which [313] you were putting this air-compressor in repair to run.

Mr. SHACKLEFORD.—We object to that. The location of a tunnel, either by survey or otherwise, is no part of the development work of the mine and further, as last stated, it is evident that the tunnel was started from noncontiguous property.

Objection overruled. Defendant allowed an exception.

A. I have not been right down to that ground since but I have been along the road. I was there the other day, and from the dump pile and from the face

(Testimony of H. T. Tripp.)

of their drift, I should judge it was very nearly the same place I ran my cut, but I have understood from parties that told me that they chose a new place, but I don't know.

Q. You know that the work they are doing up there on the tunnel is not very far from where you were?

A. I have been told that they started a little higher up than I did.

Q. I will ask you if you did any work on that tunnel? A. I did.

Mr. SHACKLEFORD.—Which tunnel?

Judge WINN.—The one he located.

Mr. SHACKLEFORD.—We object to that for the reason that the evidence shows that that work has been abandoned, as I understand it.

Objection overruled. Defendant allowed an exception.

Q. I asked you if you did any work looking toward running that tunnel—you did work on the tunnel?

A. Yes, sir.

Q. What did you do?

A. We blasted a cut in there about twenty to thirty feet, I should think. [314]

Q. Do you know how much work you put in on that? A. Yes, sir.

Q. How many days and what was the value, what you paid for it?

Same objection. Objection overruled; defendant allowed an exception.

A. I can't give that in detail now. I could find out, I guess.

(Testimony of H. T. Tripp.)

Q. Give it approximately.

A. I did about three hundred dollars' worth of work down there altogether in connection with that—cleaning out a road running up to that tunnel and cleaning the brush off and doing all the work in connection with preparing that place for a tunnel, to be started.

Q. Now, in 1909, I believe, you said it was that you put this air-compressor in condition for the purpose indicated in your testimony. I will ask you whether or not you know that Mackey, who succeeded you, in doing this work there, who is engaged in running this Ebner tunnel, is using that same air-compressor that you put in repair for running that tunnel?

Mr. SHACKLEFORD.—That is the air-compressor on the patented ground?

Judge WINN.—Yes, sir.

Mr. SHACKLEFORD.—We object to the question as incompetent, irrelevant and immaterial. It is a part of an already established mining plant, that is supposed to be alive, supposed to be kept in condition, irrespective of the development of any contiguous nonpatented claim.

Objection overruled. Defendant allowed an exception.

A. That is the same compressor and they are using it now to drive that tunnel.

Q. Now, I will ask you if, in following out this plan or scheme [315] of yours for the opening up of this claim and running this tunnel, if this tunnel you had started had been continued, whether or not

(Testimony of H. T. Tripp.)

it would have run through the Parish lode #2?

Mr. SHACKLEFORD.—We object to that as incompetent, irrelevant and immaterial.

Objection overruled. Defendant allowed an exception.

A. A tunnel could not be driven to reach the Ebner mine in any practical way without going under the Parish #2 at some point, from that point I selected, in some position.

Q. I will ask you if such a tunnel driven there would develop the Parish lode claim #2?

Same objection. Objection overruled. Defendant allowed an exception.

A. It would be driven through it, and anything of a mineral nature in there would be discovered and put in shape so it could be sampled or mined and milled, if there was anything worth being mined and milled.

Q. I wish you would step down to this map, Plaintiff's Exhibit "N," and see if you can indicate relatively where you commenced this work with respect to this tunnel, this Ebner tunnel?

A. I don't know just exactly where that is, whether it is right above mine or whether it is on the side. You can't tell from that map.

Q. From the direction,—if this is the proper direction that this present tunnel is being driven, how would the tunnel you commenced and drove be driven with respect to it?

Same objection. Objection overruled. Defendant allowed an exception. [316]

(Testimony of H. T. Tripp.)

A. It would run along on the same general line. I might have chosen a place further down on the line to run to because of my knowledge that the ore bodies in that mine, while they dip to the northerly, I think they have a tendency to work towards the south and I would like to have tapped that. That was a notion I had in my head and the general opinion I had, that that mine should be opened by the tunnel being driven so that it would finally wind up there or intersect the lead further to the south than in the neighborhood of the old Ebner mill, and in that way the work that I was doing in this part of the country—

Q. That is up—

A. Up on the Taku and Parish and the Lotta, all of that sampling work I was doing, I would have liked to have the tunnel taken a direction to come as near that ground in here (indicating), that I considered the most worthy of being opened.

Q. That is along about the centre of the claim?

A. Yes, sir, and have it strike within the limits of the claim on the southerly lode line of the Ebner mine—I think that would be the southerly lode line—no, it would be easterly not southerly.

Q. Did you do anything with the water of Gold Creek in the way of applying it or getting it ready to apply, for the purpose of generating power at the air-compressor?

Same objection. Objection overruled. Defendant allowed an exception.

A. Yes, I did. I got the compressor ready to run and got the air pressure up and I also run a

(Testimony of H. T. Tripp.)

dynamo and furnished lights for the camp. We had lights in our boarding-house and [317] lights in the office and all over the place, that is, where lights were needed.

Q. Did you get through with telling what you did looking towards bringing the water down to the air-compressor? A. Yes, sir, I did.

Q. This work that you have just been describing about bringing the water down and this work that was done on the tunnel, etc., and all the other work you have described except that matter you referred to a while ago as work done on the Parish #1 and 2, was that work exclusive of the fifty-one days you have given and applied to the Parish, or did it include those fifty-one days?

A. No; that had nothing to do with the Parish claim,—I wasn't fixing up for a lawsuit,—I put the work directly down as it was, as the men did it. I had a little chart or paper that I kept the assessment work on lying on the table and there was a draughting board over it, and I used to go in there at night, when I made up my time, and I put down on the time-book the time the men worked and then I marked down where they worked on that sheet of paper,—I had two of them, one for that purpose and one for another purpose. I am sorry that I haven't that paper now. It was carelessness in me that I lost that paper.

Q. I will ask you if any other work was done in the way of building roads or trails down at this lower end of this Ebner property?

(Testimony of H. T. Tripp.)

A. I also said I dug a trail and cleaned out a trail that ran around to the Jualpa claim,—had it brushed out; it was no great amount of work.

Q. That is up there around Cape Horn? [318]

A. On the other side of the creek from Cape Horn, on the southerly side.

Q. Did you do anything in building any road off from the main road that goes up the Basin to where you had commenced your tunnel?

A. Yes, sir, I did.

Q. What did you do there?

Same objection. Objection overruled. Defendant allowed an exception.

A. Why, I had an old road cleaned out. There was a big slide that came down there and covered that road up for a great distance, and then I had to clear it and make way for a road to get around to the place that I intended to start this tunnel, where I did start this tunnel—where I started the cut, I didn't get underground with it.

Q. Do you know approximately the money you spent in that?

Same objection. Objection overruled. Defendant allowed an exception.

A. I can't tell you exactly what it was.

Q. Within fifty or twenty-five dollars?

A. I don't know. I suppose I put in—probably there was eight or ten days put in there maybe,—perhaps more; I don't know.

Q. You heard this young man Oscar Harri testify—were you in the courtroom yesterday when he

(Testimony of H. T. Tripp.)

testified? A. Yes, sir.

Q. When you went up to the property there, some time in August, who, if anyone, did you find up there on the property? A. Oscar Harri.

Q. Now, then, the work that he testified concerning yesterday that he had done before you came up there, have you included that in your estimate? [319]

A. No, sir, I have not.

Q. Now, how long about, altogether, were you up there on that propetry in 1909?

A. I was there all the time, from the 18th day of August during the balance of that year, until the third day of August, 1910.

Q. Now, during this year of 1909, in referring to the work that was done on the two Parish claims, you have not counted any of the work you did on those claims? A. No, sir, I have not.

Q. On those fifty-one days? A. No, sir.

Q. That was in 1910 that you made a water location up there, was it not? A. Yes, sir.

Q. Now, I will ask you, Mr. Tripp, as long as you kept at work there up to 1911, if the work you carried on was all looking towards this general plan or scheme of opening up this property in the manner you have described to the Court?

Objected to as leading. Objection sustained.

Q. What was your work all the time you were on there in charge of the property and had any men working for you—what did your work consist of?

A. My work consisted in laying out and planning a line of work for the Ebner mine.

(Testimony of H. T. Tripp.)

Q. Did you take up any millsites?

A. I did; yes, sir.

Q. Did you, after having Mr. Wallenberg with you making these surveys, etc., and carrying on this work, had you also concluded as to where the most accessible place of building a mill for the purpose of opening up this property and mining its ores would be?
[320]

Same objection. Objection overruled. Defendant allowed an exception.

A. I had chosen the place.

Q. Where was that point with reference to the foundation that has since been cleared off for the building of a mill?

Same objection. Objection overruled. Defendant allowed an exception.

A. It would not have been exactly in the same place,—it would have been in the neighborhood of the same place; it would have been further up the creek and along the line under Cape Horn, where it would have been more protected than the place that was chosen, according to my notion.

Judge WINN.—That is all at this time.

Cross-examination.

(By Mr. SHACKLEFORD.)

Q. You were sent out from New York by people who before had been strangers to this property?

A. Yes, sir.

Q. I understood that is the California & Nevada Copper Company.

A. That is who I understand it to be; yes, sir.

(Testimony of H. T. Tripp.)

Q. They had an option on the stock of the larger stockholders of the Ebner Gold Mining Co.?

A. I can't tell about that. I never have seen an option. I was not consulted on that score.

Q. The property was not turned over by deed?

A. I couldn't tell that.

Q. You don't know anything about that?

A. No, sir.

Q. Have you ever heard Mr. Ebner say?

A. Well, I heard him on the witness-stand; that is all. [321]

Q. Not any other way? A. No, sir.

Q. Anyway, you were sent out here and with Mr. Ebner's permission you took charge of that property? A. Yes, sir.

Q. And your first idea was to organize a plan of campaign, after making a general investigation of the property, as to how to get the ores out of that ore body economically.

A. Yes; I think that certainly is along the line I was working all the time I was there.

Q. And in doing that you started out first and made a reconnaissance of these various claims known as the Ebner property to ascertain the location of the surface values of the claims?

A. I did practically no work along the line that is known as the Ebner lead. I let that alone—I knew enough before that, or at least I thought I did.

Q. That is, that had been developed underground in such a way that surface work could not do any good? A. Yes, sir.

(Testimony of H. T. Tripp.)

Q. But down here on the Taku lode, you did most of the reconnaissance work?

A. I did a lot of work there.

Q. And on the Lotta?

A. I am not so sure about that line, where I did most of the work. I had a map. My maps were turned over to the California & Nevada Copper Company and it has gone out of my head a little as to the lines dividing those claims.

Q. It is somewhere under the Taku and Lotta?

A. Yes, sir.

Q. Between the Keystone and Lotta? [322]

A. Yes; it was on the slope where the watershed would go to Gold Creek, below the present old mill or compressor—new mill, I mean, or compressor-house.

Q. Do you know where Miller's Gulch is?

A. Yes, sir.

Q. It was on the other side of Miller's Gulch, up the creek from Miller's Gulch?

A. It wasn't far from the line that separates those claims, from the Apex, Royal and Enterprise lodes.

Q. Upon that hillside? A. Yes, sir.

Q. Now, that work consisted in looking for crop-pings and taking samples?

A. Anything in the shape of value; yes, sir.

Q. I understand you to say that you did not get after anything that you did not see some indication on the surface?

A. That is what I was looking for; in my judgment, wherever I got evidences of values there, I had picking done.

(Testimony of H. T. Tripp.)

Q. So as to get a fair sample?

A. That is the idea.

Q. I understand that late in the year you went up there with Harri and went to Snowslide Gulch,—with Oscar Harri, was it? A. Late in the year?

Q. Yes—the time he testified about?

A. Yes, sir.

Q. Some time along after the middle of August?

A. Yes, sir.

Q. And repaired a dam?

A. I said I sent Oscar Harri with another man to show him. I went afterwards—I didn't go at that time. I remember sending— [323] I wouldn't be so positive that it was Oscar Harri—John Soini that I sent down with this man to show him where the dam was—he got lost in the brush somewhere and didn't find the dam, which is not strange at all, because that place is very much covered over, hard to get through.

Q. If a system of assessment work were kept up on that property for ten years, consisting of clearing the surface, you wouldn't be any further along at the end of ten years than when you started hardly, that is, removing vegetation?

A. No, it would grow up every year.

Q. That sort of assessment work for a series of years wouldn't give you any headway in the development work?

A. Not a great deal. It wouldn't give any really because it would grow up.

Q. And this work of ground-sluicing is imported only at the early stages of location for the purpose

(Testimony of H. T. Tripp.)

of locating the ore body in such a way as to attack it underground?

A. That would be the intention—that would be what I would sluice for, and that is the only purpose I would sluice for in that country.

Q. What did you find on the parish #2 lode when you went on there to indicate assessment?

A. I saw where there was a lot of sluicing that had been done. I saw an open cut that had been run.

Q. That is up where it is marked Borean diggings?

A. There is a pit runs through there but how much was done by Borean I have no knowledge whatever—I don't know—but I did see some sluicing that had been done down there on the Parish ground.

Q. The Borean diggings is very nearly the boundary of the Parish [324] Number 1 and 2?

A. Yes, sir.

Q. And any dirt work in that open cut near that boundary would really tend to develop the Parish #1 instead of the Parish #2, wouldn't it?

A. No, I don't think so.

Q. If there is dirt there with value in it it has probably come down the hill?

A. Yes; but it wouldn't come down the hill that way, from that side of the gulch.

Q. From that side of the gulch?

A. From that side of the gulch.

Q. The upper end of the Parish lode claim #2 and the cut that is in the ground there now is pointed toward that end line of the Parish #1, isn't it?

A. The end line, the dividing line between the

(Testimony of H. T. Tripp.)

Parish #1, and 2, cuts across the head of the Borean cut some place. I don't know exactly where that line is, although I helped to brush it out. I know pretty nearly.

Q. Have you been on the claim recently at that point? A. No, sir, I have not.

Q. Do you remember a cut, a recent cut, apparently a recent cut, in the gravel there, pointing up toward the Parish #1 line? A. Yes, I do.

Q. Now, the continuation of that cut, within a few feet, would be across that line, wouldn't it?

A. Well, I couldn't say as to that. I don't know whether that is on Number 1 or Number 2. I don't know; that is getting down pretty fine. [325]

Q. The thing that I was trying to get at was that, comparatively speaking, any work near that end line there would tend more to develop the property up the hill from it than the Parish #2?

A. I don't think that, because I think the water would run down off the hill or any cave or slide would come down off the Royal lode,—it would slide down that way, from the Royal.

Q. Then, whether it came from the Parish #1 or the Royal it would be more apt to give you an idea of the values in those claims than it would in the Number 2 Parish?

A. But if I find the value in the Royal, I could look for it in the continuation, in the Parish #2.

Q. But the dirt would indicate that it came from there? A. Yes, sir.

Q. And the question where the ledges came from

(Testimony of H. T. Tripp.)

is a question of geology that you couldn't settle from your surface work anyway?

A. Not without work; no.

Q. Now, this road here that you testified to is connected with a stairway that leads to the compressor?

A. It runs down to the stairway or where the stairway was.

Q. And the stairway goes down across to the compressor?

A. Yes; we practically did away with the stairway,—it wasn't safe. We put in a wire rope way to take the place of the stairway that was in there.

Q. That compressor has been there for some years?

A. Yes, sir.

Q. It is part of an established plant and is situated on the patented Lotta claim? [326]

A. Yes, sir, I suppose it is on the Lotta.

Q. We will assume that for the purposes of this question? A. Yes, sir.

Q. And that road and that tramway was built for the purpose of repairing the compressor and having easy access to the compressor?

A. It certainly was; yes, sir.

Q. And it wasn't connected with any tunnel, open cut or other development work that had been going on or was going on on the Parish #2 lode, was it?

A. No; it was not for the sake of getting to a place where we were cutting some trails or doing any of that work.

Q. It wasn't for the purpose of reaching any point on the Parish #2 ground?

(Testimony of H. T. Tripp.)

A. Only to get down on that ground—there is a great big flat there; there is quite a flat there; there are two or three acres of ground, and I had that particular ground surveyed out, in a prospective way, as to whether it would be a millsite or not, and that was going down on that ground for a general line or purpose.

Q. That is before you determined the place for the mill?

A. I didn't determine the place for the mill at all until I got through figuring and had everything lined out and all plans considered.

Q. Whatever intention you had of using that road as an access to a proposed millsite on that plat has since been abandoned?

A. Yes, sir, it has—by me it was.

Q. As far as indications are concerned, it is still abandoned? A. Yes, sir. [327]

Q. Now, I want you to tell the Court how many other unpatented mining claims you were trying to protect that year, 1909.

A. I think I had eleven claims up on Mount Juneau that I had some finishing work to do on in the shape of—

Q. I didn't mean yourself. I mean protect as a part of the Ebner property?

A. As a part of the Ebner property under my control?

Q. Yes.

A. I had the Cape Horn and a claim called the Cape Horn #2, and the Eureka and a fractional placer

(Testimony of H. T. Tripp.)

claim that was located up by the Ebner dam.

Q. And what about the Auk Chief and the Taku Queen—they were held in some way or other for that purpose?

A. Yes; but I bought those with the understanding that the assessment work had been done.

Q. There was no attempt to do any work on those that year? A. I didn't do any; no, sir.

Q. Where is the Cape Horn #2—it covers the proposed stamp mill and the entrance to this Ebner mine tunnel indicated on Plaintiff's Exhibit "N," doesn't it? A. Yes, sir.

Q. It is a lode claim?

I. I don't know what it is; it was a millsite at one time. I understood it was a millsite when Mr. Wettrick and Mr. Hill surveyed it.

Q. And what do you understand it to be now?

A. It was located by Mr. Ebner—I think it was. It was located as a lode claim.

Q. Now, at that time you also understood that the Cape Horn lode was part of the Ebner property? [328]

A. I did. I was so instructed.

Q. Now, Mr. Tripp, what is the value belt through the Ebner property, the main value belt as developed at the present time—where does it run through those claims?

A. It runs across the location of—it runs along the northerly end clear across all of those locations. No, it does not, either—I take that back. It runs almost diagonally across them.

(Testimony of H. T. Tripp.)

Q. Across the patented locations?

A. Across the patented locations; yes, sir. It would naturally come out there and it would apex about in here some place,—about the center, somewhere along in here (indicating). I can't locate it exactly, but that is about the general direction.

Q. About from corner #2 of the Lotta lode to the Golden Fleece in the easterly corner of the Golden Fleece?

A. About three or four hundred feet down on the Crown Point from the southerly corner.

Q. What is the formation there, to the southerly main value belt there?

A. It is a broken up formation—different kinds of formation and altered rock.

Q. Is there a foot to that belt?

A. I don't know whether there is or not. I haven't been able to determine.

Q. You spoke in your direct examination of the inclination of the footwall?

A. I spoke then of the footwall of the Ebner lead, which is a slatey formation generally for a few feet, but changes into a diurite. I don't know what other geological changes do take place there; there are so many of them that I [329] wouldn't care to try to state.

Q. Have you the result of your investigations with reference to this work on the Parish lode, showing the points at which you took your assays?

A. No, sir.

Q. Where are they? A. I haven't any.

(Testimony of H. T. Tripp.)

Q. Did you make a map and point out the places where the different samples are taken from?

A. I never got that far on that claim.

Q. Did you take any assays of the rock that you looked for on the claim—did you take any assays of the rock on the Parish #2?

A. I took some assays at one time from the Canyon, but I never took any from over the country. None of my investigations found the outcrop of any rock, ore body, that I felt like digging on.

Q. What about the creek? There was an old tunnel there in the creek—did you take anything off that stringer? A. I did not.

Q. Now, as a matter of fact, from the appearance, the position of those claims with reference to the other lodes, the patented lode claims, it would appear that they are held simply as quartz claims for surface purposes, would it not?

Judge WINN.—We object to that. Objection sustained.

Q. Well, your idea that fall was that you had to protect the Cape Horn #2, the Cape Horn lode, the Parish #2 lode and the Parish #1?

A. Yes, sir, and the Eureka.

Q. You knew at that time and the Auk Chief and the Taku Queen intervened between the Cape Horn and the Parish? [330]

A. I knew that there was some claims in there, but I didn't know just how they laid, and I bought them so as to stop any possibility of a conflict, to make any trouble about running a tunnel through there.

(Testimony of H. T. Tripp.)

Q. As a matter of fact, there is a space between those corners, is there not?

Judge WINN.—Between what corners?

Mr. SHACKLEFORD.—Between the Cape Horn corner and the Parish.

A. I think there is, yes, sir. I don't think they join there.

Q. The Eureka was another claim you had to protect?

A. The Eureka was a claim way up on the side hill some place.

Q. Was that an Ebner claim or purchase?

A. I don't know—I didn't purchase it.

Q. It was simply turned in? A. Yes, sir.

Q. And shown to you as part of the Ebner property?

A. I don't know whether that does or not—I don't think it does. I think that belongs more as an outlet to the Dora group in case all other outlet is blocked off—that is the idea I had.

Q. You considered it as part of the property under your control, didn't you?

A. Mr. Ebner spoke to me about doing the assessment work.

Q. Did you do any separate work on that claim?

A. No, sir, I did not.

Q. So, outside of the work already described and the reconnaissance work already referred to by you, if that is applicable, the other work that is mentioned here toward the development of all those claims was the driving of about \$300 worth of a tunnel on the

(Testimony of H. T. Tripp.)

Cape Horn lode, the Cape Horn #1 [331] and the Cape Horn lode?

A. If you want to get at the matter of expense, I could have segregated the cost expense and the teaming expense and the amount I put on the road between here and Juneau—I put nearly \$200 worth of work. I paid Mitchell \$61 for the half of the building of a bridge and repairing the road out here—there was a landslide—and a lot of other work that all went in for the common benefit of the mines I expected to open and *usage*, for the purpose of opening.

Q. Not only for the protection of the unpatented lode claims, but for the protection of a mine in which a considerable amount of money had been invested?

A. Yes.

Q. And upon which a large amount of machinery had been placed and which contained these patented claims?

A. On which a lot of machinery was expected to be placed.

Q. The road you are now talking about is the old Basin road that has been maintained there as a highway for all the mines there for a great many years past? A. Yes, sir.

Q. Now, I am not talking about that—your claim is that you expected by the use of the tunnel upon which you—I understood you to say you expended \$300, together with the other work you described in your testimony, to protect the Parish #1, the Parish #2, the Cape Horn and the Cape Horn #2

(Testimony of H. T. Tripp.)

and the Eureka lode?

A. No, sir; I never said anything of that sort.

Q. I want to understand how it is.

A. I did the work on the Parish #1, what little I did on [332] the Parish #1, and I did most of the work on the Parish #2, which I considered conscientiously was necessary assessment work to have been done on that claim that year and which I considered was done—I didn't propose to throw away any of the company money digging around in a way that would not be eventually for the benefit of the property—I wasn't there to waste money.

Q. I am speaking, though, outside of that testimony, under your claim about the matter there was three hundred dollars' worth of work spent on this?

A. Yes, sir.

Q. That is what you claim to be the work done, \$300 worth of work in addition to the other work you have described?

A. Yes, sir, in addition to anything else I have been questioned about.

Q. Where did you take that water out of Snowslide Gulch—can you point out on the map approximately? A. No, I cannot.

Q. You described a trail which you started down here somewhere about the Jualpa dam?

A. No, sir, from the end of the Jualpa flume.

Q. The big flume?

A. The big flume, yes, sir—so a man could come up the big flume.

Q. It run across the Colorado? A. Yes, sir.